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ABSTRACT

This study sought to assess the record of the Department of Health, Education and Welfare in carrying out its mandate to prevent racial discrimination in school districts in the 33 northern and western states that did not at the time of the "Brown" decision have laws requiring or authorizing segregation of the public schools. Ten years ago, Congress enacted the Civil Rights Act of 1964, Title VI of which provided that no person shall be subjected to discrimination in any program receiving federal funds. When this inquiry was initiated, there were several alternative theories to explain the apparent lack of impact of Title VI on northern school segregation: either that HEW had not looked for or had not been able to discover any violation of Title VI in the districts it had investigated, or that HEW had found violations in northern districts but had failed to act to redress the violations. At the end of this study, it was concluded that in many cases HEW investigations uncovered violations of the law, but the agency failed to take effective action to provide remedies to the victims of discrimination or to stem the flow of federal funds to districts which are in violation of the federal Constitution. In other cases, HEW failed to conduct any investigation at all in many districts where large numbers of minority children live and attend racially isolated schools. (Author/JM)

ABOUT THE CENTER

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One of the Center's principal objectives is to aid civil rights and public interest groups in presenting the concerns of their memberships before Federal administrative agencies and judicial bodies, with the Center providing legal and social science support and technical assistance.

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HEW and NORTHERN SCHOOL DESEGREGATION

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I. INTRODUCTION

Nineteen-year old Willie Bates was graduated last year from an all-black high school in Chicago. Throughout his career in the public schools of Chicago, he had never attended a school where a single white pupil was enrolled. Many of his white counterparts had never seen a black face in their Chicago classrooms.

Racial segregation in northern schools is still common today, twenty years after the U.S. Supreme Court, in Brown v. Board of Education[1/], held that racial segregation of children in public schools violated the equal protection guarantees of the Fourteenth Amendment. Ten years ago, in the face of continued resistance by states and local governments to the constitutional commands of the Brown case, Congress enacted the Civil Rights Act of 1964. In an effort to enlist the assistance of agencies of the executive branch in enforcing rights declared by the courts, Title VI of the 1964 Act provided that no person shall be subjected to discrimination in any program receiving federal funds.[2/] Under Title VI, it became the responsibility of the Department of Health, Education, and Welfare to prevent racial segregation and other forms of discrimination against public school students and to withhold federal assistance from school districts that did not comply with the law.

[1/] 347 U.S. 483 (1954).

[2/] 42 U.S.C. § 2000d-1 (1964).

This study was undertaken in an effort to learn why the lives of Willie Bates and so many other students in northern schools were seemingly untouched by the Brown decision and the Civil Rights Act of 1964. Specifically, we sought to assess the record of the Department of Health, Education, and Welfare in carrying out its mandate to prevent racial discrimination in school districts in the 33 northern and western states that did not at the time of the Brown decision have laws requiring or authorizing segregation of the public schools.

Our inquiry was spurred by several developments and trends:

(1) the persistence of racial separation in northern public schools at a time when segregation was declining in the South. According to HEW, in the school year 1972-73, more than 7 of every 10 black children in the North were attending majority black public schools,[3/] and the greatest number of children were in schools that were 80% or more black. This represented almost no progress in eliminating segregation since 1965[4/] and in fact a regression in some of the largest cities in the nation. During the same period, striking progress was made in integrating public schools in the South. In 1972-73, 5 out of every 10 black children in the eleven states of the old Confederacy attended majority black schools,[5/] indicating that the South had become more integrated than the North.

[3/] This figure was calculated from HEW news release, April 12, 1973. The District of Columbia is included with the 17 Southern and border states. Hawaii was not included in the HEW survey.

[4/] In that year, it was reported that 72 percent of black first graders in the metropolitan North and 70 percent in the nonmetropolitan North attended majority black schools. Coleman et al, Equality of Educational Opportunity, 40 (1966).

[5/] HEW news release, April 12, 1973.

(2) evidence that Title VI had proved to be an effective means of school integration where it had been vigorously employed. In the ten years from the *Brown* decision to passage of the 1964 Civil Rights Act, almost no progress was made in integrating southern public schools. In 1963-64, 98 percent of black children in eleven southern states still attended all-black schools. By 1972, the situation had changed dramatically, with less than 9 percent of black children in all-black schools. By all accounts, the most important factor producing change was the vigor with which HEW's civil rights staff pursued its duties under Title VI from 1965 to 1970. Every southern school district with segregated schools was required to submit an acceptable plan for desegregation. Most school authorities, confronted with the choice between complying with the law or losing needed federal assistance, decided to comply. In contrast, Title VI appeared to have had little impact on northern districts.

(3) mounting evidence that school segregation in the North, like that in the South, was the result of constitutionally impermissible actions of government officials. During the late 1950s and early 1960s, a number of courts had drawn a distinction between school segregation resulting from segregated residence patterns ("*de facto*") and school segregation attributable to the actions of school boards and other public officials ("*de jure*"), holding only the latter to be a violation of the Constitution. As the 1960s progressed, private lawyers representing black school children and their parents were successful in convincing an increasing number

of federal judges that segregation in northern schools was de jure in character.[6] These legal victories suggested strongly that unlawful segregation might not be confined to the few places where suits had been brought but might be far more pervasive.[7] Yet, in contrast to the South, what little desegregation occurred in the North was accomplished largely by efforts of private civil rights organizations, rather than by enforcement action of the United States government.

In seeking facts about government enforcement activity and explanations for the apparent lack of impact of Title VI upon problems of northern segregation, our prime source has been records that the government itself maintains about its enforcement actions. Obtaining this information from the government has proved to be a long and arduous effort. In March, 1971, the Center first wrote the Department of Health, Education, and Welfare, requesting specific information and asking to inspect files and records relating to HEW's reviews of compliance with Title VI in northern school districts. After eight months of unsuccessful negotiation, the Center sought a court order to require the Department to make these files available pursuant to the Freedom of Information Act.[8]

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[6] After our study commenced, the Supreme Court heard and decided its first northern school desegregation case, Keyes v. School District No. 1 of Denver, 413 U.S. 189 (1973). As discussed below, this decision set down standards for determining violations that may lead to findings of discrimination in many northern districts.

[7] Independent studies by the U.S. Commission on Civil Rights also suggested that northern segregation was frequently of a de jure character. See, e.g., Racial Isolation in the Public Schools, 17-72 (1967).

[8] 5 U.S.C. § 552 (1967).

As a result of a favorable decision by a federal district court,[9] and further negotiations, the Center in 1973, gained access to files of all but eighteen of the 84 districts where HEW had conducted compliance reviews.[10] It is upon an examination of these sixty-six files -- plus "sanitized" portions of the remaining eighteen files -- that this study is largely based. In addition, HEW officials have been cooperative in answering questions about their organization, policies, and methods of operations and they have furnished periodic status reports on all their active cases so that this study might reflect HEW's entire caseload. This, along with information furnished by other civil rights experts, has provided a reasonably complete picture of HEW's enforcement record as of the middle of 1973.

When we began our inquiry, we had several alternative theories to explain the apparent lack of impact of Title VI upon northern school segregation: first, despite searching inquiry, HEW had not been able to discover any violation of Title VI in the districts it had investigated; second, HEW had not conducted sufficiently thorough investigations in the North to determine whether violations existed; or third, that HEW had found violations in northern districts but had failed to act to redress the violations.

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[9] Center for National Policy Review v. Richardson, Civil No. 2177-71 (D.D.C., December 6, 1972, January 22, 1973, March 22, 1973).

[10] The District Court rejected HEW's blanket claim that these files were exempt from disclosure as "investigatory files compiled for law enforcement purposes," but the Court of Appeals reversed -- fortunately after our report was virtually completed. Center v. Weinberger, ___ U.S. App. D.C. ___, (Civil No. 73-1090, May 21, 1974). HEW has maintained that these are "active" cases, in which law enforcement action may be taken, despite the fact that in some instances, the investigation has been pending for three years or more. The Court of Appeals stated in dicta that only "factual data submitted to the agency as a matter of routine" was available to the public. The Center is seeking a rehearing by the full court.

At the end of our study, we have concluded that as to the northern districts which HEW has investigated, our last hypothesis is the one most nearly correct. In many cases, HEW investigations uncovered violations of the law, but the agency failed to take effective action to provide remedies to the victims of discrimination or to stem the flow of federal funds to districts which are in violation of the Federal Constitution. In other cases, HEW failed to conduct any investigation at all in many districts where large numbers of minority children live and attend racially isolated schools.

In the pages that follow we detail the factual bases for these broad conclusions and analyze the reasons for what we regard as faithlessness to legal duty on the part of government officials sworn to uphold the law. We do so in the hope that the next generation of students, black and white, whose rights are entrusted to government protections will not suffer the same fate as Willie Bates.

II. EARLY HISTORY OF TITLE VI ENFORCEMENT IN NORTHERN SCHOOL SYSTEMS

A. *THE BEGINNING: CHICAGO*

At the time the 1964 Civil Rights Act was enacted, it was unclear how the principles of Brown v. Board of Education applied to school systems in the North, where substantial racial segregation in fact existed but where segregation had not -- at least in recent times -- been mandated by law. What was clear, however, was that segregation in northern schools was a serious educational problem that had been fostered in various ways in various places by local school authorities, and that many schools attended primarily by black children offered inferior educational programs, facilities, and teachers.

Within a year after Title VI became law, the Office of Education had received 15 complaints of segregation and discrimination in northern and western school systems. To many officials at HEW, it seemed logical to investigate the most thoroughly documented northern complaint first, logical to dispatch a review team to that northern city where the most information was already available, and logical to apply the same compliance procedures used in the South -- the holding up of federal funds pending an investigation. But this bureaucratic logic led to a political disaster which thwarted any further substantial northern school desegregation enforcement efforts for nearly three years.

HEW Secretary John Gardner decided to act on a well-documented complaint by Chicago's Coordinating Council of Community Organizations (CCCO), a federation of civil rights groups, charging that school superintendent Benjamin Willis was maintaining segregated vocational schools and was working with the Chicago Real Estate Board and public housing authorities to maintain overcrowded, segregated schools for black pupils.[11] HEW investigators went to Chicago in 1965 when the racial crisis was at its height. During the preceding ten years, there had been a tangled series of lawsuits, school boycotts, discarded studies, and political confrontations. U.S. Commissioner of Education Francis Keppel, with insufficient foresight, passed over the administratively and politically safer route of testing northern Title VI enforcement in a smaller, less complex school district.

The procedures of the Office of Education permitted Commissioner Keppel to delay funds while complaints were being investigated. At that time, Congress had just provided the initial appropriations for the 1965 Elementary and Secondary Education Act, and Chicago's share was to be $32 million. Newspaper reports indicated that Superintendent Willis wanted to use the money for purposes inconsistent with the intent of the legislation, namely for improving the education at many predominantly white schools and for keeping blacks from flowing into white schools by purchasing portable classrooms, tagged "Willis wagons," for attachment to overcrowded black schools. Partly because of the racial segregation and partly because of the news of the potential misuse of the funds, Commissioner Keppel on October 1, 1965, wrote the Illinois State Superintendent of Education that funds would be held up because the district was being put in a deferred status pending investigation of the CCCO complaint.

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[11] For a detailed explanation of HEW's decision to conduct a review in Chicago and an excellent analysis of the political disaster which ensued, see Orfield, The Reconstruction of Southern Education, 151-207 (1969).

This letter of deferral raised a storm from Superintendent Willis, Congressman Roman Pucinski, and Mayor Richard Daley. Superintendent Willis demanded a bill of particulars specifying what violations of Title VI were under investigation -- a difficult demand to meet when illegal segregation in the North had not yet been defined by the courts. Representative Pucinski accused HEW of jeopardizing local control of education and threatened to bottle up further federal appropriations for public school aid. And Mayor Daley, a Democratic political power, personally met with President Lyndon Johnson requesting his assistance. President Johnson urged HEW officials to settle the issue at once, so on October 5, only four days after the deferral letter went out, HEW negotiated a face-saving settlement, agreeing to release the funds and to withdraw HEW investigators for two months in exchange for a promise from Chicago school officials to conduct their own investigation of school zone boundaries and to reaffirm two earlier school board resolutions concerning desegregation. Morale in HEW plummeted and the Justice Department, under pressure from Illinois Senator Everett Dirksen, issued guidelines forbidding HEW to hold up funds without prior administrative hearing on the matter.

The Chicago misfortune chilled all Title VI enforcement efforts in northern and western school systems for almost three years. While reviews were conducted in San Bernardino, San Francisco, Bakersfield, Fresno City, Pasadena, and Sequoia Union High School District, California; Wichita, Kansas; and Boston, Massachusetts, no effort was made to expedite these cases and find the districts in non-compliance until April, 1968, when Wichita was sent a letter of probable non-compliance. The Office of Education explained the sluggish pace of its enforcement program by pointing out that northern school segregation was hard to establish because of the "quicksands of legal interpretation,"[12/] and by asserting that OE had insufficient staff to make hard cases. Federal officials chose to let local communities deal with northern school desegregation on their own, using federal funds to finance the effort under Title IV of the 1964 Civil Rights Act[13/] -- a policy which produced little desegregation.

A second result of the Chicago disaster was a revision of northern enforcement strategy. When congressional pressure renewed HEW's interest in northern enforcement in 1967 and 1968, HEW selected small districts where Title [illegible] cases could presumably be established most readily and without political interference. Among these were River Rouge, Ecorse, and Ferndale, Michigan, all suburbs of Detroit, Penn Hills Township, Pennsylvania, a suburb of Pittsburgh; and Union Township, New Jersey, a suburb of Newark.

[12/] Commissioner Harold Howe II's words at a news conference May 2, 1966. N.Y. Times, May 3, 1966, p. 30, col. 1.

[13/] N.Y. Times, Feb. 12, 1967, p. 51, col. 2. Title IV provides for a survey and report on equal educational opportunity, technical assistance to desegregating districts, and grants for in-service training for teachers, as well as for suits by the Attorney General to achieve desegregation.

B. PHASE TWO: RESPONSE TO CONGRESSIONAL PRESSURE

HEW's renewed interest in northern school desegregation was in part a response to a surge of pressure from southern congressmen who were feeling the heat generated by HEW's growing program of enforcement in the South. Complaining that HEW was treating their region unfairly by ignoring segregation elsewhere, they called for uniform enforcement throughout the nation, hoping to gain political allies in other sections in an effort to slow enforcement everywhere. By May, 1967, when Congresswoman Edith Green offered an amendment to the Elementary and Secondary Education Act requiring HEW guidelines and regulations to be uniformly applied in all regions of the country,[14] HEW had initiated enforcement action against 259 southern school districts and had cut off the federal funds of 38. The Green Amendment became law in January, 1968, over the opposition of HEW, which took the position that the requirements for historically dual school systems were properly different from those with no such history and that the amendment would weaken HEW's southern enforcement by diverting needed manpower.

In April, 1968, a separate Northern Branch was formally established in the Education Division of the Office for Civil Rights (OCR). A staff of 20 people began working with the Justice Department to select for scrutiny school systems in the North of a moderate size with a substantial black enrollment. Steps were taken to establish the first regional offices in the North. In 1968 offices were opened in New York, Chicago, Boston, and San Francisco.

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[14] Elementary and Secondary Education Amendments of 1967, Pub. L. No. 90-247, §2, 20 U.S.C. §888, repealed by Pub. L. No. 91-230, §401(e), 1970, and superseded by 20 U.S.C. §1232(a) and (c) (1970).

That summer, Mississippi Senator John Stennis, a member of the Senate Appropriations subcommittee having jurisdiction over HEW, added language to the pending fiscal 1969 Labor-HEW appropriations bill to require HEW to assign as many staff to investigate the North as were assigned to the South.[15/] When the bill became law in October, 1968, HEW had 32 staff members in the North and 67 for the South. By March, 1969, HEW had expanded its northern staff to 53 persons and correspondingly reduced its southern staff to 51. By that time 40 school districts in 13 northern and western states had come under review. Of these, six had been sent letters of probable non-compliance, while two others had been referred to the Justice Department for possible court action. It was also during this period -- in the fall of 1967 -- that HEW began collecting racial enrollment data on northern and western systems. This data, a key factor in selecting districts for compliance review, had been collected in the South since 1966.

C. THE DEVELOPMENT OF "GUIDELINES"

Parallel with the growth of the staff and procedures of the Office for Civil Rights has been the growth of guidelines, regulations, and substantive law governing school desegregation. Title VI of the 1964 Civil Rights

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[15/] Section 410 of the Labor-HEW Appropriation Act of 1969, Pub. L. No. 90-557 (1968), required the Secretary of HEW to "assign as many persons to the investigation and compliance activities ... in the other States as are assigned to the seventeen Southern and border States ..." 1 U.S. Code Cong. & Admin. News, 1147 (1968).

Act was just bare bones: a broad, undefined mandate that no person on the ground of race could be subjected to discrimination under any program or activity receiving federal aid. To add flesh to Title VI, HEW adopted regulations in December, 1964, requiring that, to receive federal aid, school districts must file an assurance either that they were not discriminating, that they were complying with a court desegregation order, or that they would submit a voluntary desegregation plan subject to acceptance by HEW.[16] Most important, HEW issued "Guidelines" outlining in rather general terms what steps would be required of a segregated school system to bring itself into compliance with Title VI.[17]

Section 602 of the Civil Rights Act of 1964 provided that no rule or regulation under Title VI should become effective until approved by the President, and the "Guidelines" were never submitted for presidential approval. As a statement of what action HEW considered necessary for a district to be eligible for federal aid, the "Guidelines" nonetheless had enormous impact. Their impact was enhanced by the Fifth Circuit Court of Appeals' decision in *United States v. Jefferson County Bd. of Ed.*,[18] holding that in determining what action was required to comply with *Brown*, HEW's

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[16] 45 C.F.R. §80 (1973). These regulations were issued pursuant to Section 602 of the Civil Rights Act of 1964, 42 U.S.C. §2000d-1 (1964).

[17] Successive editions of the "Guidelines" were officially entitled "General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools" (1965); "Revised Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964" (1966); "Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964" (1968).

[18] 380 F.2d 385 (5th Cir. 1967) (on rehearing *en banc*), *cert. denied*, 389 U.S. 840 (1967).

Title VI "Guidelines" would be given great weight. Thus, the courts' and HEW's standards for desegregation were made essentially the same.

The "Guidelines" stirred a clamor in the South because, like HEW's primary enforcement effort, they were targeted mainly at some 2000 school districts in the seventeen southern and border states which still operated dual school systems. The Green Amendment, introduced in May, 1967, and enacted in January of 1968, required that all guidelines and regulations be applied uniformly throughout the country. Accordingly, in March, 1968, HEW issued new guidelines applicable to all school systems, North and South.

The 1968 "Guidelines" set forth general standards applicable to northern-style school desegregation. School systems were required to assure that there would be no segregation of pupils caused by the location of new schools or by additions to old schools, or the granting of student transfers out of certain schools, or the assignment of pupils to certain classes within a school.[19/] Further, school systems were required to assure that pupils of foreign origin were not denied the same educational opportunities generally available to students proficient in English.[20/] Third, systems must correct disparities between schools, such as in relative overcrowding of classes, the assignment of less qualified teachers, the provision of less

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[19/] "Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964" (1968), Section 7.

[20/] Id., Section 8.

adequate curricula or services, the spending of less money per pupil, the provision of books and equipment in a comparatively insufficient quantity, and the provision of poorly maintained buildings.[21] Finally, where there has been discrimination in policies and practices toward teachers, school systems are responsible for taking "whatever positive action might be necessary" to correct the effects.[22]

D. JUDICIAL APPLICATION OF BROWN IN THE NORTH

As already indicated, HEW's Title VI regulations in effect provided that a district which was complying with desegregation standards laid down in a judicial decree pursuant to Brown would be deemed to be complying with the requirements of Title VI. Indeed, it was both logical and expedient for HEW to act on the assumption that the standards embodied in the Constitution as construed in Brown were essentially the same as those which Congress intended to embody in Title VI. HEW's northern enforcement program might therefore be expected to follow the course of judicial decisions applying Brown in the North.

At the time of the 1964 Act's passage, it was by no means clear how Brown would be applied to northern and western school systems. Narrowly read, the decision dealt only with mandatory assignment of children to schools on the basis of race ("de jure" segregation).

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[21] Id., Section 9.

[22] Id., Section 10.

Broadly interpreted, it outlawed any system of pupil assignment that resulted in substantial disparity in racial ratios at different schools, on the ground that regardless of its cause racial separation created unequal educational opportunity ("*de facto*" segregation). A series of federal appellate cases rejected this latter reading of *Brown*,[23] although a line of district court decisions from New York and Massachusetts came close to embracing it.[24] On the other hand, a decision involving the public schools of New Rochelle, N.Y., found that attendance zones had been manipulated to preserve a high degree of racial segregation, held this to be a violation of *Brown*, and ordered remedial action.[25] And in the District of Columbia, *Hobson v. Hansen* explored other varieties of discrimination and held them unconstitutional: provision of unequal educational programs and facilities, unequal expenditure of funds, and racial assignment of teachers as between predominantly black and predominantly white schools.[26]

23/ Bell v. School City of Gary, Ind., 234 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1965); Downs v. Board of Education, 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).

24/ Blocker v. Bd. of Ed. of Manhasset, N.Y., 226 F. Supp. 208 (E.D. N.Y. 1964); Branche v. Board of Ed. (Hempstead, N.Y.), 204 F. Supp. 150 (E.D.N.Y. 1962); Barksdale v. Springfield School Committee, 237 F. Supp. 543 (D. Mass. 1965), *vacated on other grounds*, 348 F.2d 261 (1st Cir. 1965).

25/ Taylor v. Board of Education, 191 F. Supp. 181 (S.D.N.Y. 1961), *appeal dismissed as premature*, 288 F.2d 600 (2nd Cir. 1961), *remedy reconsidered on rehearing*, 195 F. Supp. 231 (S.D.N.Y. 1961), *aff'd* 294 F.2d 36 (2nd Cir. 1961), *cert. denied*, 368 U.S. 940 (1961), *order modified*, 221 F. Supp. 275 (S.D.N.Y. 1963).

26/ 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

With their set-back in several cases urging that de facto segregation was unconstitutional, lawyers for black plaintiffs in the North began developing evidence designed to demonstrate that most segregation in northern districts was de jure in character. They argued that de jure segregation was manifested not simply by laws or official, disclosed policies of racial separation, but by decisions made by school authorities in such matters as selecting sites for new schools and determining their size, establishing or modifying attendance boundaries, setting student transfer policies, and assigning teachers. Where these decisions were made in a manner that furthered racial segregation, plaintiffs claimed, the necessary racial intent could be inferred unless school authorities could demonstrate that they had no reasonable alternatives available that would have resulted in less segregation. In a series of cases beginning in the late '60s, the federal courts accepted this view.[27]

Thus when HEW's interest in Title VI enforcement in the North was renewed after 1967, it appeared that extensive fact-finding and data collection would be necessary to establish a violation, but that investigation would frequently unearth facts sufficient to show that the law had been violated.

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[27] United States v. School Dist. 151 of Cook County, 404 F.2d 245 (7th Cir. 1968); Davis v. School Dist. of Pontiac, 309 F. Supp. 734 (E.D. Mich. 1970), aff'd 443 F.2d 573 (6th Cir. 1971), cert. denied, 404 U.S. 913 (1971) supp. order vacated 474 F.2d (6th Cir. 1973), 487 F.2d 890 (6th Cir. 1973); Spangler v. Pasadena City Bd. of Ed., 311 F. Supp. 501 (C.D. Cal. 1970) intervention denied 427 F.2d 1352 (9th Cir. 1970), cert. denied, 402 U.S. 943 (1971). See Part IV below, for further discussion of cases finding de jure segregation in the North.

III. TITLE VI ENFORCEMENT: ORGANIZATION AND PROCEDURE

A. *HEW'S ENFORCEMENT AUTHORITY*

Title VI of the Civil Rights Act of 1964 provides that no person shall be discriminated against because of his race or national origin in any program or activity that receives federal funds.[28] Under this law, each federal department is responsible for making sure that discrimination does not exist in the programs and activities which the department funds. In money terms, HEW is the major agency affected by this law. An enormous chunk of federal funds, some $6.3 billion in fiscal 1974, goes to the numerous federal aid to education programs[29] which HEW administers.

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[28] 42 U.S.C. §2000d, (1964).

[29] There are dozens of federal aid to education categorical grant programs, including, Education of Children of Low-Income Families, Title I, Elementary and Secondary Education Act of 1965 (hereinafter ESEA), 20 U.S.C. §241a-241m; School Assistance in Federally Affected Areas (Impact Aid), 20 U.S.C. §236-241-1, 242-244; Emergency School Assistance Act, 20 U.S.C. §1601-19; School Library Resources, Title II, ESEA, 20 U.S.C. §821-827; Supplementary Educational Centers and Services, Title III, ESEA, 20 U.S.C. §841-848; Education of the Handicapped, Title VI, ESEA, 20 U.S.C. §871-880; Bilingual Education Programs, Title VII, ESEA, 20 U.S.C. §880b; Vocational Education, 20 U.S.C. §1241, 1391; Manpower Development and Training Act §231, 42 U.S.C. §2571-2574; Education Professions Development Act, 20 U.S.C. §1111-1119a; Guidance, Counseling, and Testing, Title V, National Defense Education Act of 1958, 20 U.S.C. §481-485; School Construction in Federally Affected Areas, 20 U.S.C. §631-645; Surplus Federal Property Donation Program, 40 U.S.C. §484(j) and 484(k); Teacher Corps, 20 U.S.C. §1101-1107a; Children of Migratory Workers, 20 U.S.C. §1107a; School Construction and Operation in Case of Certain Disasters, 20 U.S.C. §241-1, 646; Child Development Head Start, Economic Opportunity Act of 1964, Title II, 42 U.S.C. §2809(a)(1); Follow Through, Economic Opportunity Act, §222(a)(2), 42 U.S.C. §2809(a)(2); Demonstration Cities and Metropolitan Development Act of 1966, Title I, 42 U.S.C. §3301 et seq. 186 HEW programs affected by Title VI procedures are listed in 45 C.F.R. Part 80, Appendix A.

The Secretary of HEW has designated the Office for Civil Rights to carry out the responsibility of making sure that school districts which receive federal aid do not discriminate. As a result, the main duties of the Office for Civil Rights have come to be (1) to enforce Title VI of the Civil Rights Act of 1964, and more recently, (2) to enforce the more detailed civil rights provisions of the Emergency School Aid Act,[30/] the federal aid program especially designed to help districts undergoing desegregation. Other duties include the enforcement of Executive Order 11246, Title IX of the Education Amendments of 1972, and the sex non-discrimination provisions of the Comprehensive Health Manpower and Nurse Training Acts of 1971.[31/]

[30/] Education Amendments of 1972, Pub. L. No. 92-318, Title VII, 20 U.S.C. §1601-1619 (1972) superseding the Emergency School Assistance Program, enacted in the Office of Education Appropriations Act, Title I (1971), Pub. L. No. 91-380, extended by Pub. L. No. 92-38. The Emergency School Aid Act authorizes federal money grants to help school districts meet special needs incident to the desegregation process. The regulations, 45 C.F.R. §185 (1972), prohibit school districts from transferring property to segregated private academies, prohibit pupil segregation for more than 25 percent of the school day, except for ability grouping, require black and white teacher and staff racial balance in each school, and require local citizen advisory committees to be established. A substantial amount of Office for Civil Rights' staff time is spent conducting Emergency School Aid Act post-grant reviews to enforce these provisions. This study, however, deals only peripherally with HEW's enforcement of ESAA and other non-discrimination laws other than Title VI.

[31/] The executive order prohibits discrimination by employers holding federal contracts. Title IX prohibits sex discrimination in education programs receiving federal grants. The Health Manpower and Nurse Training Acts prohibit sex discrimination in medical and nursing schools.

B. INTERNAL ORGANIZATION OF THE OFFICE FOR CIVIL RIGHTS

Within HEW, OCR is part of the Office of the Secretary. More than half of the 500 compliance staff members work on enforcing school desegregation.[32/] The rest are responsible for monitoring compliance by hospitals, libraries, nursing homes, state government agencies like welfare departments, day care centers, federal contractors, and colleges and universities. The Elementary and Secondary Education Division of the Office for Civil Rights (hereinafter called Education Division) is responsible for enforcing school desegregation both in the North and the South. See the Office for Civil Rights organizational chart on page 21.

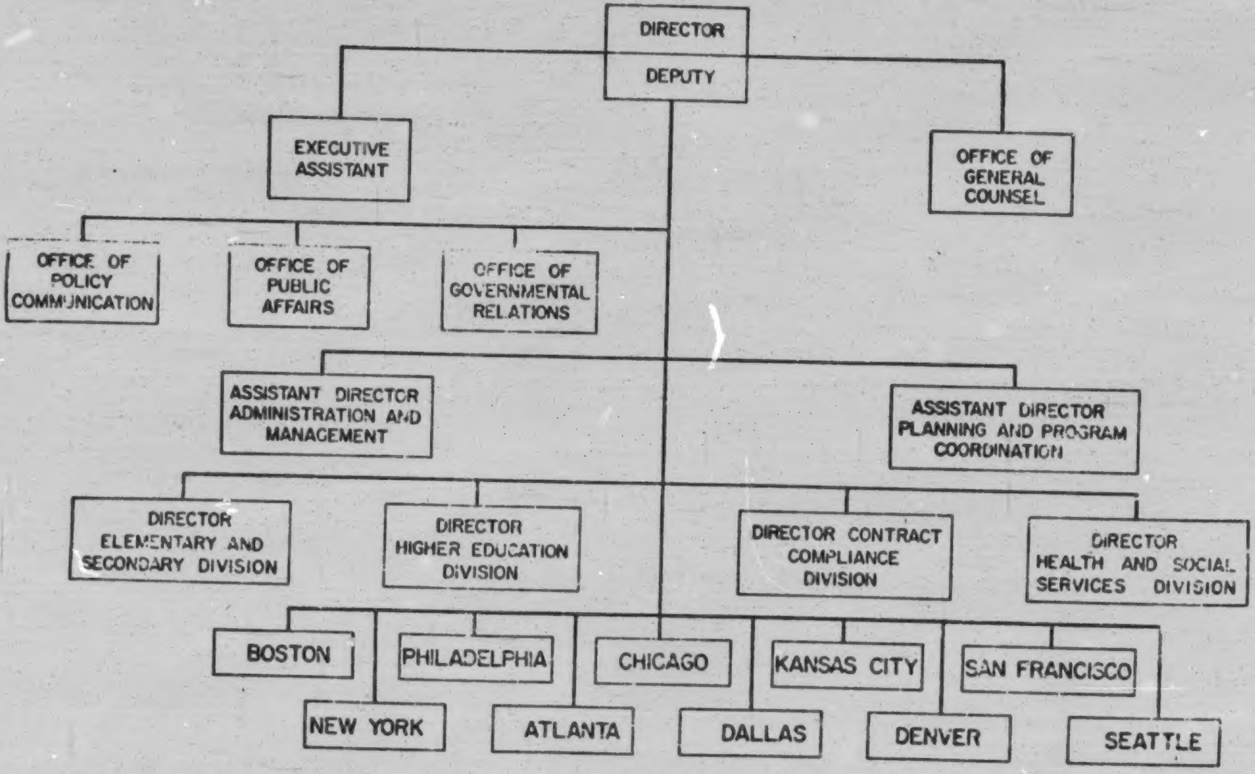
From 1968 to 1973, the Education Division had two branches, a southern one and a northern and western one. In fiscal 1973, the Northern Branch was staffed with 106 professionals, some 24 more than the Southern Branch total.[33/] The Northern Branch was headed by a coordinator who reported to the Director of the Education Division and ultimately to the Director of the Office for Civil Rights. On September 24, 1973, the OCR reorganized its Education Division so there would no longer be separate Northern and Southern Branches. Instead the division has been rearranged according to function.

[32/] Figures are for fiscal 1973 unless otherwise noted.

[33/] For fiscal 1974, the Office for Civil Rights requested 119 professional positions for compliance activities in the North and 90 positions for the South.

Chart I

Office for Civil Rights


DIRECTOR
DEPUTY
EXECUTIVE ASSISTANT
OFFICE OF GENERAL COUNSEL
OFFICE OF POLICY COMMUNICATION
OFFICE OF PUBLIC AFFAIRS
OFFICE OF GOVERNMENTAL RELATIONS
ASSISTANT DIRECTOR ADMINISTRATION AND MANAGEMENT
ASSISTANT DIRECTOR PLANNING AND PROGRAM COORDINATION
DIRECTOR ELEMENTARY AND SECONDARY DIVISION
DIRECTOR HIGHER EDUCATION DIVISION
DIRECTOR CONTRACT COMPLIANCE DIVISION
DIRECTOR HEALTH AND SOCIAL SERVICES DIVISION
BOSTON
PHILADELPHIA
CHICAGO
KANSAS CITY
SAN FRANCISCO
NEW YORK
ATLANTA
DALLAS
DENVER
SEATTLE

The Office for Civil Rights also has ten regional offices, whose organization parallels that of the central office. Each has a director and four divisions, one of which is an education division. Eight of the ten regional offices are located in northern and western states. Four large regional offices exist in Chicago,[34] New York, Philadelphia, and San Francisco, and four small offices are located in Boston, Seattle, Kansas City, and Denver. Of the 106 professionals working on northern school desegregation, some 80 are at the regional offices while 26 are in the headquarters in Washington. The reorganization of the Education Division in the Washington headquarters in September, 1973, did not affect the organization of the regional offices.

Education Division staff conducts compliance reviews of school districts to identify student segregation, discrimination in educational programs, and faculty and staff discrimination. It investigates complaints and negotiates with school authorities concerning corrective action. When negotiations fail, Division personnel, coordinating with the civil rights staff of the Office of General Counsel, prepare recommendations for the commencement of fund termination proceedings.

The Office for Civil Rights does not have its own attorneys. Rather it receives legal assistance from the Civil Rights Division of HEW's Office of General Counsel. OGC's Civil Rights Division is concerned not only with schools but with all civil rights responsibilities of HEW; of the 36 lawyers in the Division, eight work on school desegregation matters, both northern and southern. There is also a General Counsel staff attorney in each of the regional offices, who is available to the regional OCR staff for legal advice and assistance.

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[34] Half of the Chicago regional office is actually located in Cleveland.

C. *OCR'S INVESTIGATIVE PROCESS*

To determine which of the approximately 12,500 school districts in the thirty-three northern and western states[35] have potential compliance problems, the Office for Civil Rights depends on two sources: (1) statistical reports which school districts are required to file with HEW showing racial break-down of students, teachers and staff; and (2) complaints received from pupils, teachers and parents.

All districts in the nation enrolling more than 3,000 pupils are surveyed, along with a representative sample of districts enrolling between 300 and 3,000 pupils. As a result, OCR has racial data from about 5,500 districts, enrolling about 90 percent of all northern and western public school children. The 5,500 districts represent a sample of about 8,500 districts enrolling 98 percent of all public school pupils in northern and western states.[36] Reports from these districts are analyzed for racial segregation of pupils in schools or classrooms, discrimination in teacher placement, and other practices which may violate Title VI of the 1964 Civil Rights Act.

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[35] These are the states which did not have compulsory school segregation laws at the time of the Brown decision in 1954.

[36] Included in this latter survey are all districts in litigation, all districts under a court order plan of desegregation, all districts with a minority enrollment of 10 percent or more, and all districts having one or more schools with an enrollment of 50 percent or greater minority.

The other source used for determining which school districts have potential civil rights compliance problems is complaints from pupils, teachers, or parents in these districts. Originally all reviews conducted in the North were triggered by complaints. Now, however, complaint-triggered reviews are rare. During fiscal year 1973, the Northern Branch of the Education Division of OCR received 177 complaints. While most complaints were normally disposed of by correspondence or a simple telephone call, occasionally they prompted an on-site review or even a full scale compliance review. Complaints sent to the Washington office were usually referred to the appropriate regional office. There they were answered, but frequently not really resolved, as will be explained in Part V of this report. Complaints about districts under court order or in the process of litigation, whether the Justice Department is a litigant or not, are referred to the Justice Department. The Office for Civil Rights does not follow up or insist that Justice keep it informed concerning the resolution of referred complaints.

If the potential problem in a school district appears to be significant and it interests the Office for Civil Rights, a review team may be dispatched for an on-site visit. On-site visits may involve anything from a limited investigation of a particular complaint to a comprehensive and detailed examination of a school district's entire operation. From 1965 until 1968, all on-site reviews and visits were conducted out of Washington. As regional offices were established, the regional staffs were augmented with Washington staff, and site visits gradually devolved upon the regional offices. At present, the regional offices in Chicago, San Francisco, and New York conduct visits and reviews on their own, while other offices receive assistance from Washington staff.

D. THE SUBSTANCE OF COMPLIANCE REVIEWS: WHAT OCR LOOKS FOR

The object of OCR in a compliance review is to discern whether or not the racial segregation in a school district is officially sanctioned by actions of local school officials. In the 17 southern and border states where schools were originally required by state law to be racially separate, the vestiges of the dual school systems often remained, and it was not difficult to demonstrate the link between current racial isolation and past action on the part of school officials enforcing segregation laws. However, in the North and West, there is usually no modern and distinct history of overt or acknowledged racial assignment. Pupil assignments in the North have traditionally been made on a geographic basis, and school board actions which establish or maintain racial separation have been more subtle than in the South.

While there is no precise way to establish school board responsibility for discrimination or segregation, OCR looks for evidence in six major areas: student assignment and attendance zone policies, site selection for building schools, over-and under-utilization of facilities, inferior educational services at certain schools, rescission of desegregation plans, and teacher assignment policies. All these matters are under the control of the local school board and can provide a basis for the inference that actions were for the purpose of racially isolating children or subjecting minority pupils to inferior educational facilities or programs.

In small northern and western districts, the Office for Civil Rights assigns one member of a review team to examine school board minutes, a second member to survey student assignments, and a third member to survey teacher personnel files, and two or three other members to compare education services at each school, to check for misuse of ability grouping, and to probe problems of language discrimination. In larger school districts, more staffers are often required because the task of proving offically sanctioned racial segregation is usually more difficult.

The review team must often obtain a history of housing distribution patterns by race from local planning commissions, real estate brokers, and census data. They must check recorded deeds for restrictive covenants and talk with minority realtors to obtain information on the extent to which neighborhood segregation was caused by private and public housing discrimination. They must then compare their findings with maps showing present and former boundaries of school zones and then examine school board minutes to determine the motives of the board in making zone changes. Not infrequently, for example, school boards have been found to intensify the concentration of minority children in minority schools by increasing the capacity of buildings in minority areas rather than assigning black children to underutilized white schools nearby. The review team must also examine the history of site selection for school construction, and must check not only school board student transfer policies but also the actual effect of such policies, to see whether they resulted in transferring out of majority black schools.

Reviewers must investigate, too, teacher recruitment and assignment practices. Sometimes districts have been found to recruit teachers by making personal visits to predominantly white colleges, while merely sending a list of job openings to black colleges. The reviewers must also determine whether experienced teachers are transferred from minority schools and replaced with teachers with less experience, and whether minority teachers have been assigned mainly to minority schools.

Finally, the team must compare the education and services among the different schools and different racial groups in the school district. They must analyze the curricula, teacher qualifications, educational expenditures, testing programs, special education pupil assignments, and the sufficiency of bilingual programs.

HEW's Title VI regulations and "Guidelines" are couched in such general terms as to provide no specific guidance to compliance reviewers in determining what to look for or where to look in seeking evidence of a Title VI violation. More important are internal documents and materials developed by OCR. One such document, developed in July, 1970, is called "Basic Components of a 441 Review." A 441 Review is a routine compliance review undertaken to see whether a district is complying with the assurance it signed -- a 441 form -- that it is not discriminating in violation of Title VI. To insure uniformity, OCR developed an outline of things to look for under three broad headings -- equality of educational services and opportunities, pupil assignment patterns, and personnel policies and practices. Each heading is divided into numbered subsections with brief comments on what facts to seek out and where to find them.

Another set of relevant internal materials is a compilation called "Legal Aspects of Title VI" which is used for Education Division investigation workshops and training programs. It includes papers on pupil assignment, extra-curricula activities, staffing practices, comparability between schools, discrimination in private schools, investigative techniques, and national origin discrimination, and a sample Emergency School Assistance Program brief. The format used in most of these papers is an explanation of the relevant legal points followed by a list of questions to ask school officials. These materials are up-dated periodically. They have never been formalized into rules, regulations, or orders, however, because of the time which would be required to refine them, and the political hazards entailed in getting them approved by top HEW officials and the President. Moreover, in practice, regional offices have found some parts of the materials more relevant to their needs than others and accordingly have given them emphasis.

In addition, OCR has issued three memoranda on specific subjects which are intended to supplement the "Guidelines." The first, issued May 25, 1970, entitled "Identification of Discrimination and Denial of

Services on the Basis of National Origin,"[37] was a response to complaints from Mexican-American groups in the Southwest concerning the failure of the public schools to prepare students with little or no English language facility for education in totally English-speaking schools. The memorandum requires, for example, that districts with at least 5 percent Spanish-surnamed students institute remedial language programs, discontinue ability-grouping based solely on English language criteria, and if necessary, send notices to parents in Spanish. A good deal of activity has been undertaken to follow up on this memorandum.[38]

The Office for Civil Rights issued its second memorandum, "Nondiscrimination in Elementary and Secondary School Staffing Practices,"[39] on

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[37] 35 Fed. Reg. 11595 (1970). In Lau v. Nichols, 94 S. Ct. 786 (1974), the Supreme Court held that a violation of the requirements of this memo - the failure of a school district to teach English to Chinese students - was presumptively a violation of Title VI, on the ground that the memo was an authoritative interpretation of the statute by the agency charged with its administration.

[38] The 3.7 million "national origin minority" children in public schools include not only the 2.5 million Mexican Americans in the Southwest, but also some 700,000 Puerto Ricans in the Northeast and Midwest, 241,000 American Indians in the West, and 209,000 Orientals mainly on the west coast. OCR began its northern effort in Boston and its southern effort in Beeville and El Paso, Texas, districts where large numbers of children who could not speak English were being denied the full educational opportunities available to those who could. Reviews soon thereafter were initiated in Fresno and Bakersfield, California; Tucson and Winslow, Arizona; Hoboken and Perth Amboy, New Jersey; and East Chicago, Indiana. A massive compliance review was undertaken in New York City in August, 1972, inquiring into educational services available to some 300,000 Puerto Rican pupils in that public school system. OCR also has investigated discrimination directed toward American Indians in Shawano, Wisconsin, and recently four small districts in Minnesota.

[39] 36 Fed. Reg. 11769 (June 18, 1971).

January 14, 1971. Based mainly on Singleton v. Jackson Municipal Separate School District[40/], this memo was primarily designed to deal with the problem of dismissal and demotion of disproportionate numbers of black teachers and administrators in desegregating southern school systems. But, it extended to all districts, North and South, the principle of Singleton, which requires school systems to assign personnel working directly with children so that the ratio of black to white teachers and staff in each school approximates the ratio in the district as a whole. The memorandum also covers disproportionate hiring, promotion and dismissal, and warns northern districts that racial disproportion in any of these aspects of employment will justify an inference of discrimination. The memo also deals with recruitment practices, but it does not resolve one of the chief questions concerning faculty discrimination in the North: What constitutes under-representation of minority faculty in a school system as a whole?

The third memorandum, issued by OCR in February, 1973, deals with sex discrimination. In June, 1972, Congress enacted the Education Amendments of 1972, Title IX of which amended Title VI of the 1964 Civil Rights Act to prohibit discrimination on the basis of sex in all federally assisted education programs.[41/] The February memorandum explained the

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[40/] 419 F.2d 1211 (5th Cir. 1970), cert. denied, 396 U.S. 1032 (1970).

[41/] 20 U.S.C. §1681 (1970).

general application of Title IX,[42] and in May, 1973, a memorandum was issued to vocational and technical school directors advising them that if their institutions are open to only one sex, they should develop transitional plans for the elimination of all obstacles within six years.[43] Until June, 1974, HEW was only implementing the law for higher education and vocational schools.[44] OCR has not yet adopted an enforcement policy on sex discrimination in elementary and secondary education.[45] Because women's rights organizations are filing sex-discrimination complaints in very large numbers, OCR administrators feel that an adequate response may require diverting staff from performing traditional civil rights complaince duties.

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[42] "Title IX of the Education Amendments of 1972 Prohibiting Discrimination on the Basis of Sex as it Affects Elementary, Secondary, and Vocational Schools and Programs," Memorandum for Chief State School Officers and Local School Superintendents, Feb., 1973.

[43] "Title IX of the Education Amendments of 1972. Prohibition of Sex Discrimination in Admission by Certain Educational Institutions," Memorandum for Directors of Institutions of Vocational Education Participating in Federal Assistance Programs, May 30, 1973.

[44] "Title IX of the Education Amendments of 1972. Prohibition of Sex Discrimination -- Plans to end Discrimination in Admission by Certain Educational Institutions," 38 Fed. Reg. 117754 (July 3, 1973) relates to higher education only.

[45] On June 20, 1974 -- two years after passage of Title IX -- HEW proposed rules to enforce the prohibition of sex discrimination. The Department is accepting comments from interested parties until October 15, 1974 -- allowing considerably more time for comments than is customary -- before issuing revised, final rules, thus precluding any appreciable effect on the 1974-75 school year. 39 Fed. Reg. 22227.

E. PROCEDURE FOLLOWING FIELD INVESTIGATION

The compliance review process may require a single site-visit or several; and site-visits may last a week or may extend over several months. Eventually, after completion of its field investigation and analysis of information and data obtained, the investigating team prepares a report with its recommendations. It may also draft a proposed letter of probable non-compliance, addressed to the district, specifying the respects in which the district appears to be in violation of Title VI.

According to procedures in force until October, 1973, that still apply to old cases, the team's report and non-compliance letter are reviewed by the Chief of the regional office Education Branch and cleared by the Regional Director. They are then forwarded to Washington for review by the Area Desk Chief and Northern Coordinator and eventual clearance by the Director of the Education Division.[46/]

After approval by both the Regional Director and the Director of the Education Division, the report goes to the Office of the General Counsel where it is analyzed to determine whether the evidence it contains is legally sufficient to support the recommendations. On first

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[46/] Under a new policy, the regional office may send letters of non-compliance in cases developed since October, 1973, without referral to Washington. The Director must still approve a decision to defer funds or notice of a hearing, however.

review, the General Counsel's Office returns about half of the reports to the regional office with directions to get more evidence in specified problem areas. When the new evidence is obtained from the superintendent or by means of another on-site visit to the district, it is incorporated into the report, which then proceeds through the same regional office and Washington OCR channels back to the Office of General Counsel for further review. Once the Office of General Councel clears the report, it is forwarded with a clearance memorandum to the Director of OCR, who will normally approve the report and the proposed letter of non-compliance.

The regional Education Director then sends the school district the letter of probable non-compliance, indicating the areas of violation and requesting the district to take immediate corrective action. The district is expected to reply to the regional office stating its position on each of these problem areas. The typical response is that the district does not believe there is a violation, but that nevertheless it constantly reviews its operations and will undertake a study of these areas. When the Office for Civil Rights informs the district that this response is not sufficient, the district often counters with a request that HEW provide funds to hire consultants to develop a desegregation plan.[47/] It has been the informal policy of the Office for Civil Rights

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[47/] The Civil Rights Act of 1964, Title IV, 42 U.S.C. §2000c-2(1964) authorizes HEW to render technical assistance to school districts regarding effective methods of coping with problems occasioned by desegregation. HEW may help draw up a plan and may make available personnel of the Office of Education specially equipped to advise and assist districts with their educational problems.

to allow this process of sparring to continue for a while, and then to allow a generous period of time for the district to develop its own plan. OCR believes that plans developed by the district are more likely to be implemented in good faith than ones imposed by the federal government under a deadline.

Once a plan is developed, the regional office and the Office of General Counsel evaluate it and indicate their tentative acceptance, or if it is not acceptable, note the controverted areas and request a conference with the district. If no resolution is finally agreed on by the regional office at this conference, the matter is forwarded to the Washington office for more conciliation efforts. If further conciliation efforts fail, the Director of OCR may then make the reluctant decision to commence enforcement proceedings.

F. *ENFORCEMENT PROCEDURES*

Pursuant to Section 602 of the 1964 Act and HEW's regulations[48/], there are two primary methods for enforcing Title VI: (1) termination of federal aid to the offending district, and (2) referral of the matter to the Department of Justice for the commencement of a civil action to end segregation and discrimination in the school system. A July 3, 1969, joint statement by then-Secretary of HEW Robert Finch and then-Attorney General John Mitchell announced agreement that judicial enforcement of desegre-

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[48/] 45 C.F.R. sec. 80.8(a) (1973). Part D of the "Guidelines" also includes a description of these enforcement methods.

gation by means of Justice Department suits would, as a matter of general policy, be preferred to administrative enforcement by termination of federal funds.

Section 602 also provides that enforcement action shall not be taken until HEW determines that "compliance cannot be secured by voluntary means." In practice, enforcement proceedings are begun only after many months, or even years, of investigation, negotiation and conciliation. During that time, the school district continues to receive federal funds. In Adams v. Richardson[49], the United States Court of Appeals for the District of Columbia Circuit held that where HEW unduly prolonged the process of negotiation and conciliation following findings of probable non-compliance, and allowed the flow of federal funds to continue, the agency had abused its discretionary powers and violated its duty to enforce Title VI.

In cases in which the Director of OCR decides to proceed with enforcement by means of fund termination, he sends the school district superintendent a notice of intention to initiate formal enforcement proceedings.[50] Along with the notice is sent a "deferral letter." These notices tend to accelerate negotiations between HEW and the district, because the school board begins to feel a threat that funds may really be cut off. Actually, though, federal funds are not cut off before or during the hearing process, which can last for months or even years. All that happens in the interim is that action is deferred on applications for funding of new programs.[51] The school district continues to receive federal funds for previously approved programs, often totalling many millions of dollars, while negotiations continue and the lengthy hearing process runs its course.

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[49] 480 F.2d 1159 (D.C. Cir. en banc, 1973). See also, note 125, infra.

[50] 45 C.F.R. §80.9(a) (1973).

As required by law,[52] HEW has an elaborate procedure for giving the district a full-blown hearing before an independent hearing examiner.[53] The hearing is scheduled at least 20 days after the notice is sent, unless both parties agree to a delay. Presiding over the hearing is an examiner designated by the Civil Service Commission.[54] Both sides present witnesses and oral argument and then submit written briefs. The hearing examiner then issues a written decision covering the testimony, the findings of fact, and the conclusions of law.[55] The school district's counsel may file exceptions to the decision with a Reviewing Authority of five persons that renders its own decision on each exception.[56] The school district may then request the Secretary of HEW to review this decision.[57] However, review by the Secretary is discretionary and has yet to be granted. Full reports of the termination action are transmitted to the appropriate congressional committees,[58] and termination may not occur until 30 days later.[59]

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[51] Deferral cannot extend more than 60 days beyond conclusion of the hearing. Education Amendments of 1966, Title I, §182, 42 U.S.C. §2000d-5 (1964). Deferral of funds for new programs is not itself a denial of federal funds requiring a prior hearing. Board of Public Instruction of Palm Beach County, Florida v. Cohen, 413 F.2d 1201 (5th Cir. 1969).

[52] Civil Rights Act of 1964, §602, 42 U.S.C. §2000d-1 (1964)

[53] Administrative Procedure Act, 5 U.S.C. §554 (1967).

[54] 45 C.F.R. §80.9(a) (1973).

[55] 45 C.F.R. §80.10(d) (1973).

[56] 45 C.F.R. §81.10(b) (1973).

Under the law, the agency action is subject to further review by the courts.[60] The school district may petition the Court of Appeals in its area and ask not only for a review of the cut-off but also a stay of the termination order.[61]

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[57] 45 C.F.R. §§80.10(e) and 81.106 (1973).

[58] Senate Committee on Labor and Public Welfare and House Committees on Education and Labor and Government Operations.

[59] Actually not all funds are cut off. Funds from the programs of the National School Lunch Act and Child Nutrition Act of 1968 continue under the rationale that the benefits of these programs go directly to the children and not the school system. However, federal funds from other non-HEW sources are cut off. These other federal agencies join in with HEW in the fund termination hearing.

[60] Civil Rights Act of 1964 §603, 42 U.S.C. 2000d-1 (1964); 45 C.F.R. §80.11 (1973).

[61] Only one northern school district has ever sought judicial review. The district, Ferndale, Michigan, in the case School Dist. of the City of Ferndale, Michigan v. Department of Health, Education, and Welfare, was unsuccessful in obtaining either a stay or a reversal of the HEW termination order, 474 F.2d 1349 (6th Cir. 1973), cert. denied, 94 S. Ct. 126 (1973).

IV. AN OVERVIEW OF THE CURRENT HEW NORTHERN SCHOOL DESEGREGATION EFFORT

Current efforts by the Office for Civil Rights to enforce northern school desegregation represent but a small portion of the many problems and cover but a few districts of the 12,500 in the North and West. The problems range from student expulsions to metropolitan desegregation, from unequal per pupil instructional expenditures to inadequate efforts to recruit minority teachers. The districts themselves vary from those like Chicago with large black residential areas where busing is necessary to desegregate the system to rural districts like Bonner County, Idaho, where busing is taken as a matter of course for all children. The districts vary in size from Philadelphia and Detroit, with enrollments exceeding a quarter of a million children, to districts like Mountain View, Wyoming, and Wilkes-Barre Township, Pennsylvania, with less than 500 children. Superimposed on these wide ranges in size and geography are wide variations in racial composition. Many of the 12,500 northern districts like Phillipsburg, Montana, have no minority children at all or only a very small number. On the other hand, others, such as Newark, which is 72 percent black and 13 percent Spanish American, are overwhelmingly composed of minority pupils.

Thus, OCR's task has been to try to identify problems and the districts in which they exist, and to determine priorities. The office has tackled the task by analyzing statistics it receives annually from districts throughout the country and by scrutinizing the complaints generated by minority parents, teachers, and community groups. As a result of these efforts some 84 northern and western school systems have been visited for routine Title VI compliance reviews.[62] Some 56 or two-thirds of these districts are of small or medium size, that is, having an enrollment of under 20,000 pupils. The total enrollment of the 84 districts is about 2.1 million pupils, of whom 650,000 or 30 percent are black and 182,000 or 8.5 percent are Spanish American. (See Appendix B.)

This composite enrollment figure of 2.1 million pupils, the number of children covered by HEW compliance efforts in the North, overstates the actual reach of HEW activities. First of all, 187,[illegible]e 2.1 million children are enrolled in Pontiac, San Francis[illegible]ille-Vanderburgh, and San Bernardino. In these districts H[illegible]nducted reviews, but the schools were actually brought into compliane by the litigation efforts of private parties.

Moreover, as to one-third of the 2.1 million pupils[illegible]ent action has been taken over by the Department of Justice, w[illegible]s instituted civil actions in federal court for the purpose of obtaining relief. These Justice Department districts, where HEW has abandoned enforcement responsibility, include Chicago, Pasadena, Kansas City, Waterbury, and Omaha.[63] They represent a total enrollment of 723,000 pupils.

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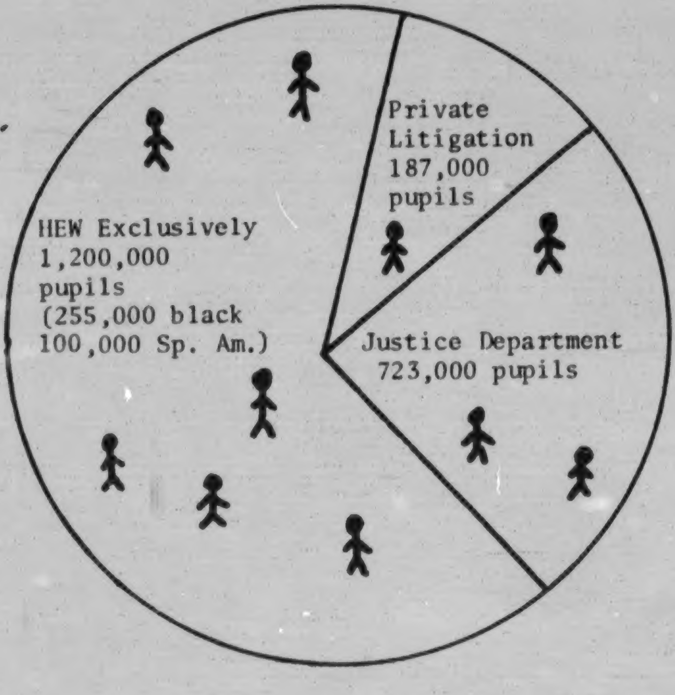
[62] These districts are listed by name in the Appendix of this report. More districts have been visited informally for lesser problems.

[63] Relief has yet to be secured in Chicago, Omaha, Kansas City, and Waterbury cases.

Together the group of districts handled by Justice and those brought into compliance by private litigation represent about 910,000 or 42 percent of the 2.1 million figure. (See Chart 2, below) In short, only about 1.2 million pupils, only 255,000 of whom are black and less than 100,000 of whom are Spanish American, may be or have been

Chart 2.
The 2.1 Million Pupils in the 84 Districts
In the North and West Where HEW
Has Conducted Title VI Reviews



affected mainly by HEW civil rights enforcement action in the North and West.

Most significantly, the 255,000 black pupils and 99,000 Spanish American pupils[64] represent less than 9 percent of all black pupils and less than 5 percent of all Spanish American pupils attending public schools in the North and West. These low percentages may be explained broadly by either of two hypotheses. Either there is not much discrimination in the North and West to investigate or HEW's enforcement efforts have been less than comprehensive or vigorous.

One way of gauging which of these alternative explanations is the more plausible is to compare the HEW track record with that of private litigants in the same terrain. At least 32 northern and western cities are or have been involved in school desegregation litigation brought by private parties.[65] A comparison of their composite enrollment figures with those of districts reviewed by HEW is shown in Table I.

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[64] This figure does not include the New York City national origin review begun in August, 1972, because that review is a special project separate and distinct from OCR's routine compliance reviews. The massive New York project will focus on evaluating the educational services offered to the 300,000 Puerto Rican students enrolled in that city's public schools.

[65] This figure does not include suits brought by private parties in state courts since such suits ordinarily are based on state law instead of federal or constitutional law, e.g., Crawford v. Board of Education (Inglewood), Civil No. 822854 (Superior Ct. L.A. Cty. February 11, 1970). Nor does this figure include federal suits litigated mainly by the Justice Department instead of by private parties, e.g. United States v. School District 151 of Cook County, Illinois (South Holland), 286 F. Supp. 786 (N.D. Ill. 1968), aff'd. as modified, 432 F.2d 1147 (7th Cir.

Table I

A Comparison of Districts Reviewed by HEW and Districts Litigated by Private Parties

	HEW[a]	Private Parties
number of districts	75 (84)	32
number of pupils (total)	1.2 (2.1) million	1.6 million
number of black pupils	255 (650) thousand	554 thousand
number of Spanish American pupils	99 (192) thousand	76 thousand

[a] Figures in parentheses includes 4 districts where compliance was achieved by private litigation and 5 districts under Justice Department jurisdiction.

Discrimination has been found by the courts so far in at least 20 of these 32 cases brought by private litigants.[66] The composite enrollment of

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1970), *cert. denied*, 402 U.S. 943 (1971); United States v. Board of Education, Waterbury, Connecticut, Civil No. 13465 (Filed Oct. 15, 1969, D. Conn., consent judgment, June, 1973; plan submitted by district under review); United States v. School District No. 12 of Madison County, Civil No. 4422 (S.D. Ill., September 6, 1968); United States v. School District 500 of Kansas City, Civil No. ____ (D. Kan. May 18, 1973); United States v. School District of Omaha, Civil No. 73-0-320 (D. Neb. August 10, 1973. Also excluded from this figure are all the suburban school districts swept into litigation as part of the relief sought in metropolitan desegregation cases -- *e.g.*, the 89 districts in the Detroit case and the 25 districts in the Indianapolis case.

[66] Keyes v. School District No. 1 (Denver), 303 F. Supp. 279 (D. Colo. 1969), *stay vacated* 369 U.S. 1215, *on remand*, 303 F. Supp 289 (D. Colo. 1969); 313 F. Supp. 61 and 90 (D. Colo. 1970), *aff'd. in part and rev'd in part*. 445 F.2d 990 (10th Cir. 1971), *modified and remanded* (413 U.S. 189 (1973), *on remand*, 368 F. Supp. 207 (1973); Bradley v. Milliken (Detroit), 433 F.2d 897 (6th Cir. 1970), 438 F.2d 945, *rev'd. and remanded*, -- U.S. -- (July 25, 1974). Davis v. School Dist. of Pontiac, *supra*, note 27; Taylor v. Board of Education (New Rochelle), *supra*, note 25; Clemons v. Board of Education of Hillsboro, Ohio, 228 F.2d 853 (6th Cir. 1956), *cert. denied*, 350 U.S. 1006 (1956);

these 20 districts is 991,000 pupils, of whom 348,000 are black and 56,000 Spanish American. In three of the 32 districts the segregation was found to be *de facto,* not actionable.[67] The remainder of the cases are still pending or were settled.

Another way of assessing HEW's record is to compare the minority pupil enrollment of districts where the courts have found discrimination with the minority enrollment of districts where HEW has found discrimina-

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Soria v. Oxnard School Dist. Board of Trustees, 328 F. Supp. 155 (C.D. Cal. 1971), 467 F.2d 59 (9th Cir. 1972), *appl. for stay denied,* 409 U.S. 945 (1972) *vacated and remanded*, 488 F.2d 579 (9th Cir. 1973); Oliver v. Kalamazoo Bd. of Ed., 346 F. Supp. 766 (W.D. Mich., S.D. 1971), *aff'd*, 448 F.2d 635 (6th Cir. 1971) 368 F. Supp. 143 (1973); Kelly v. Guinn (Las Vegas), 456 F.2d 100 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); United States v. Bd. of School Commissioners (Indianapolis), 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 466 F.2d 573 (7th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973), 474 F.2d 81 (7th Cir. 1973), *cert. denied,* 413 U.S. 920 (1973); Barksdale v. Springfield School Committee, *supra*, note 24; Booker v. Special School District No. 1 (Minneapolis), 351 F. Supp. 799 (D. Minn. 1972); Johnson v. San Francisco Unified School District, 339 F. Supp. 1315 (N.D. Cal. 1971), *stay denied*, 404 U.S. 1215 (1971); Spangler v. Pasadena City Bd. of Ed., *supra*, note 27; Brice v. Landis (Pittsburg, Cal.) 314 F. Supp. 974 (N.D. Cal. 1969); Blocker v. Board of Ed. of Manhasset, N.Y., *supra*, note 24; Hoots v. Commonwealth of Pennsylvania (Allegheny County), 334 F. Supp. 820 (W.D. Pa. 1971), 359 F. Supp. 807 (D.W. Pa. 1973); Berry v. School District of the City of Benton Harbor, Civ. No. 9 (W.D. Mich. Feb. 17, 1970); Brinkman v. Gilligan (Dayton), Civil No. 72-137 (E.D. Ohio, April 17, 1973); Martin v. Evansville-Vanderburgh School Corp., 347 F. Supp. 816 (S.D. Ind., 1972); Branche v. Bd. of Ed. (Hempstead, N.Y.), *supra*, note 24.

[67] Bell v. School City of Gary, Indiana, Deal v. Cincinnati Bd. of Ed., Downs v. Bd. of Ed. of Kansas City, *supra*, note 23.

tion. The latter includes both those in which HEW has made a finding of probable non-compliance and those in which it has secured compliance prior to a formal finding.

HEW has found discrimination in and sent letters of probable non-compliance to 22 northern and western school districts[68/] and has settled 3 others without sending a letter.[69/] As is shown in Table 2, below, the total enrollment of these 25 HEW districts is 554,000 pupils, of whom 105,000 are black and 48,000 Spanish American. The 20 districts found

Table 2

Districts Where Discrimination Has Been Found:
A Comparison of Private Efforts and HEW Efforts

	HEW	Private Parties
number of districts	25	20
number of pupils (total)	554,000	991,000
number of black pupils	105,000	348,000
number of Spanish American pupils	48,000	56,000

[68/] Winslow, Arizona; Tempe, Arizona; Tucson, Arizona; Bakersfield, California; Berkeley, California; Sequoia Union High School District, California; Fresno, California; Kankakee, Illinois; East Chicago, Indiana; Evansville-Vanderburgh, Indiana; Garden City, Kansas; Wichita, Kansas; Holcomb, Kansas; Boston, Massachusetts; Ferndale, Michigan; Union Township, New Jersey; Mt. Vernon, New York; Dayton, Ohio; Middletown, Ohio; Penn Hills, Pennsylvania; Odgen, Utah; and Shawano, Wisconsin.

[69/] Loveland, Colorado; Poughkeepsie, New York; and McKeesport, Pennsylvania.

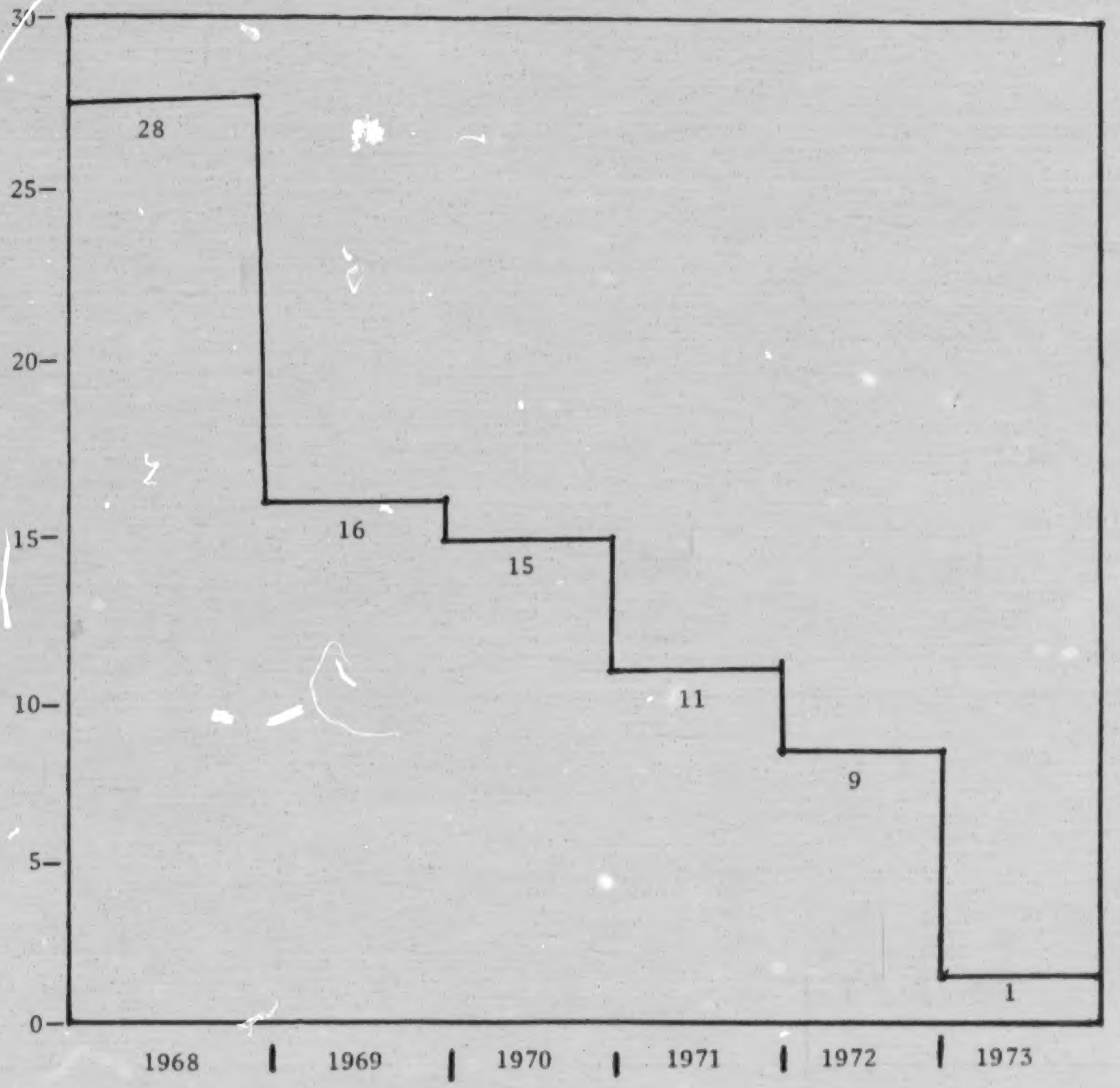
to be discriminating in private law suits involved 991,000 pupils of whom 348,000 are black and 56,000 Spanish American. Put another way, the efforts of private litigants have affected almost three times as many minority pupils as the actions of the federal agency charged by Congress with assuring there is no discrimination in federally aided public schools.

A second disconcerting fact is the steady decline in the number of reviews that HEW has initiated each year since 1968. HEW initiates a review by selecting a district with problems and writing a letter to the superintendent announcing the agency's intention to conduct an on-site review. HEW began conducting reviews in 1965 with Chicago. The agency initiated its second review in 1966 in San Bernardino, California, and in 1967, started two more reviews, Penn Hills Township, a Pittsburgh suburb, and in Wichita, Kansas. Beginning in 1968 when the northern and western school desegregation effort gained momentum because of congressional pressure and an increase in staff, the number of reviews picked up. In 1968, reviews were initiated in 28 new school districts. (See Chart 3 on next page)

Since 1968, the trend has been downhill. Although the number of staff continued to increase, the number of reviews initiated has steadily decreased. In 1969 reviews were initiated in 16 new districts; in 1970, 15, in 1971, 11; in 1972, 9; and in 1973, one. Part of the reason for the drop to zero after January, 1973, was the decision to initiate no new

Chart 3

Decline in the Number of Reviews Initiated by HEW, 1968 - 1973



reviews until all existing reviews were completed and disposed of. In some cases that have remained unresolved for years, the data originally collected have become stale, and feelings of frustration have arisen among regional investigating teams who did the work. Much of the decline can also be attributed to the emergence of a new responsibility in 1970, that of reviewing thousands of districts receiving Emergency School Assistance Program[70] funds. Nevertheless the fact remains that a steady increase of staff has brought with it a steady decline in initiating new reviews.

Another measure of the vigor of HEW in its northern effort is the rate at which cases proceed after a review is initiated. If any pattern at all is discernible, it is that the overwhelming majority of cases have moved at a snail's pace. (See Appendix A.)

By July 1, 1973, of the 84 districts where reviews had been started, the cases of 52 remain open or unresolved (see Chart 4). Of the 32 which have been closed, 10 were closed on the grounds that the evidence showing non-compliance was insufficient.[71] Three more were closed after HEW accepted voluntary changes when the Title VI deficiencies were brought to the attention of school officials after the on-site reviews.[72] Another four cases were closed when the Justice Department acquired jurisdiction over them.[73] Five more cases were closed when private litigants successfully obtained relief by court order.[74] Eight cases were closed after letters of noncompliance were sent to the districts and a satisfactory negotiated settlement was obtained thereafter.[75] The other two closed cases went through an administrative hearing for the termination of federal funds. In one of these cases, Wichita, Kansas, the school board negotiated an acceptable plan after a decision unfavorable to them was rendered by the hearing examiner. In the other termination case, Ferndale, Michigan, the school board, after losing all appeals, had its federal funds terminated and still today refuses to desegregate a black elementary school.

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[70] Supra, note 30.

[71] Clifton, Arizona; Waterloo, Iowa; Springfield, Illinois; Rock Island, Illinois; Coffeeville, Kansas; Goodland, Kansas; Sharon Springs, Kansas; Toledo, Ohio; Monticello, New York; and Hammond, Indiana.

[72] Loveland, Colorado; Poughkeepsie, New York; and McKeesport Area, Pennsylvania.

All other HEW cases are still open, although many, ripe with old age, are somewhat inactive. This group of open cases, a total of 52 districts, has an average age in excess of 37 months. This means that, typically, more than three years have elapsed from the time of the initial review to the end of fiscal 1973.

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[73] Waterbury, Connecticut; Chicago, Illinois; Kansas City, Kansas; and Omaha, Nebraska. Although the Pasadena, California, case also came under the jurisdiction of the Justice Department, it was closed because relief was obtained through the litigation efforts of a private party.

[74] San Francisco, San Bernadino and Pasadena California; Evansville-Vanderburgh, Indiana; and Pontiac, Michigan.

[75] Berkeley, California; Kankakee, Illinois; East Chicago, Indiana; Middletown, Ohio; Shawano, Wisconsin; Ogden, Utah; Union Township, New Jersey; and Penn Hills, Pennsylvania.

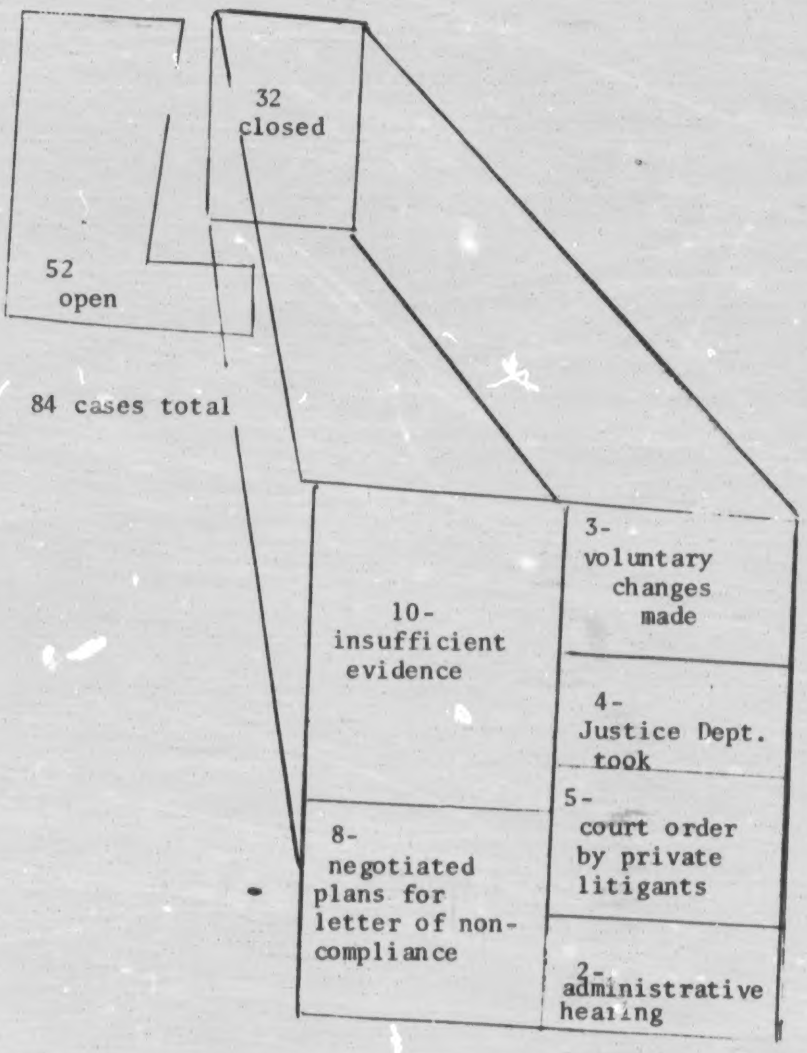

Chart 4

Status of 32 Closed HEW Cases, July, 1973

In only 11 of the 52 cases has a letter of non-compliance been sent[76] and of these only two -- Boston and Mount Vernon, New York -- have reached the administrative hearing stage. Four more[77] have been stayed pending the outcome of private litigation. Three of these are suburban Detroit districts set aside by HEW on grounds that they might be encompassed in a metropolitan plan of relief bring sought in the Bradley case. Since the Supreme Court recently reversed the lower court decision requiring metropolitan relief,[78] HEW's stay effectively delayed and denied vindication of the rights of suburban black children for five years.

Thirty-seven (or three-fourths) of these cases[79] are still under review, with no enforcement action at all (see Chart 5). As will be discussed later, this pattern of protracted pre-enforcement review stems in part from problems in the Office of General Counsel. It should be noted that in all cases (even those in the hearing stage) the school district is still receiving federal funds.

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[76] Tempe, Arizona; Tucson, Arizona; Winslow, Arizona; Bakersfield City Elementary School District, California; Fresno, California; Sequoia High, California; Garden City, Kansas; Holcomb, Kansas; Boston, Massachusetts; Mt. Vernon, New York; and Dayton, Ohio.

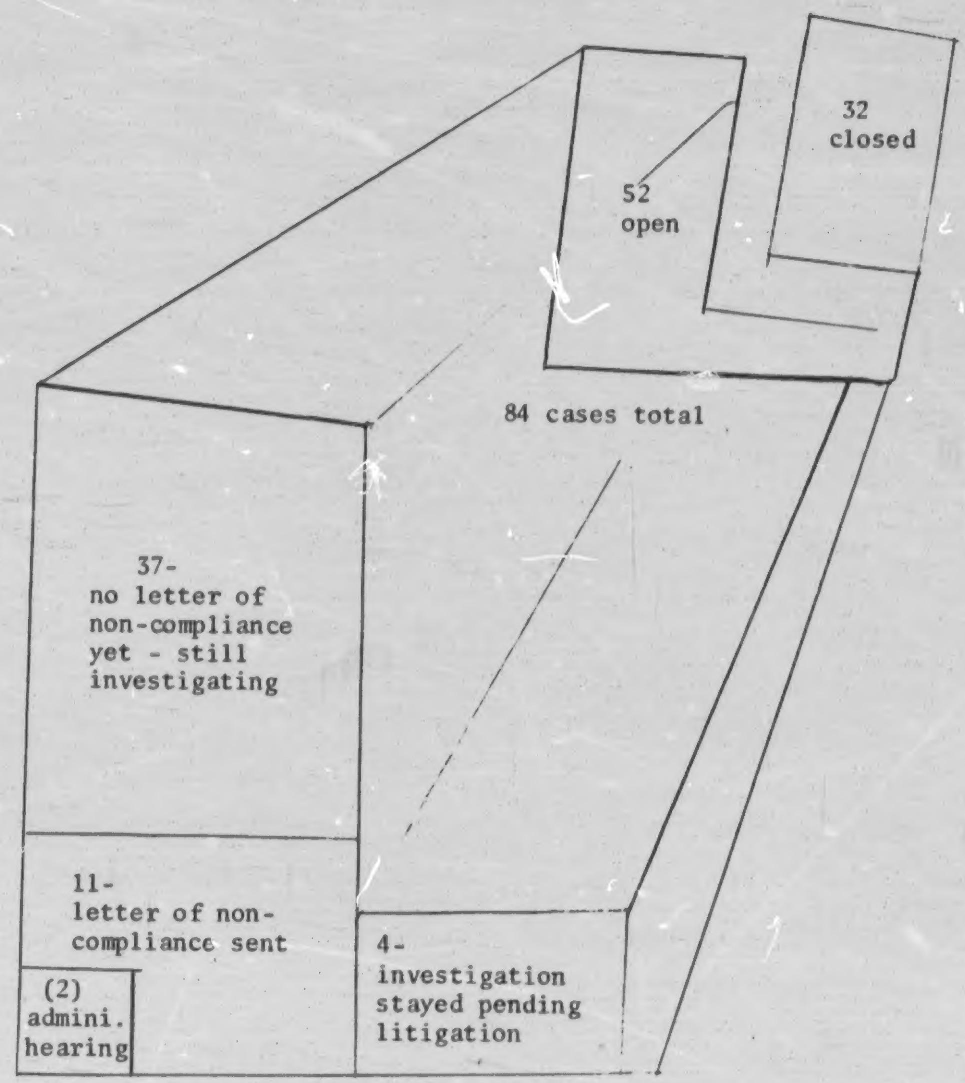
[77] Westwood Community, Michigan; Ecorse, Michigan; River Rouge, Michigan; and Buffalo, New York.

[78] Bradley v. Milliken, supra, note 66.

[79] Delano Joint Union High School District, California; Delano Joint Union Elementary School District, California; Pomona, California; Watsonville, California; Colorado Springs, Colorado; Ft. Lupton, Colorado; Pueblo City, Colorado; Hartford, Connecticut; Stamford, Connecticut; Joliet, Illinois; Maywood, Illinois; Cahokia, Illinois; Ft. Wayne, Indiana; South Bend, Indiana; Ulysses, Kansas; Flint, Michigan; Saginaw, Michigan; Bemidji, Minnesota; Cloquet, Minnesota; Deer River, Minnesota; Detroit Lakes, Minnesota; Atlantic City, New Jersey; Hoboken, New Jersey; Passiac, New Jersey; Perth Amboy, New Jersey; Pleasantville, New Jersey, Lackawanna, New York; Utica, New York; Canton City, Ohio; Defiance, Ohio; Hamilton, Ohio; Lima, Ohio; Fremont, Ohio; Leipsic, Ohio; Springfield City, Ohio; Warren City, Ohio; and Racine, Wisconsin.

Chart 5

Status of 52 Open HEW Cases, July 1, 1973


32
closed
52
open
84 cases total
37-
no letter of
non-compliance
yet - still
investigating
11-
letter of non-
compliance sent
(2)
admini.
hearing
4-
investigation
stayed pending
litigation

Put another way, HEW conducted reviews in 84 northern and western school districts. In 10 cases HEW made a judgment that the evidence was insufficient to go further. In the remaining 74, relief had been obtained in 17 cases, but had yet to be obtained in 56 cases, as is shown in Table 3.

Table 3

Disposition As of July 1, 1973 of the Cases in the 84 Districts in Which HEW Conducted A Review

10 -	Closed; insufficient evidence of discrimination to make a case.	
17 relief obtained	3 - Voluntarily before a letter of non-compliance was sent.	
	8 - Negotiated after a letter of non-compliance was sent.	
	4 - Court order obtained by private litigants.	
	1 - Negotiated after administrative hearing.	
	1 - Consent decree obtained by Justice Department.	
56 relief not obtained yet	4 - Investigation stayed pending court case decision.	
	11 - Letter of non-compliance sent	9 - Negotiations continuing.
		2 - Administrative hearing pending.
	37 - No letter of compliance has yet been sent.	
	4 - Justice Department assumed jurisdiction.	
1 80/	- Funds terminated but district still refuses to comply.	

80/ In Ferndale, Michigan, relief has been obtained in that Title VI has been fully enforced and federal funds no longer go to a school district that discriminates. Relief has not been obtained, however, for the children who are the victims of discrimination.

The large number of unresolved cases is all the more striking because the overwhelming majority are not new, but old, cases that have been pending for years. OCR staffers concede that, in most northern and western school district cases, no more than a year should elapse from the time a district is reviewed by the regional office to the time a determination is made by OCR and OGC that the district is not in compliance. In fact, in eight early cases the time required to write the report and clear it through the national OCR office and OGC in Washington averaged considerably less than a year.[81] However, from 1971 on, the administrative, investigative, and clearance process averaged more than 32 months. While this slowdown may be explained in part by the increasing complexity of issues tackled by OCR -- such as inadequate educational opportunities for Spanish American pupils and discriminatory ability grouping -- there appears to be no plausible explanation for letting two or three years go by before presenting the agency's formal findings to the superintendent. This process in three districts -- Tucson, Arizona; Fresno, California; and Holcomb, Kansas -- took more than four years, and in six other districts -- Winslow, Arizona, Berkeley, California; Evansville-Vanderburgh, Indiana; Boston, Massachusetts; Mt. Vernon, New York; and Shawano, Wisconsin -- took from 24 to 48 months.

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[81] Odgen, Utah took 11 months; Sequoia Union High School, California, 9 months; Dayton, Ohio, 8 months, Kankakee, Illinois and Middletown, Ohio, 6 months; Wichita, Kansas, 5 months; Union Township, New Jersey, 4 months; and Ferndale, Michigan, only 2 months.

The excessive time lag in the above cases is exceeded only by the extraordinary delay in enforcement encountered in those districts where investigations went on for years and no findings were made at all by June 30, 1973. In 37 open school cases[82] investigations were pending for an average of 33[83] months and the Office for Civil Rights had yet to send districts a letter stating the areas in which investigators had found the district in probable non-compliance.

Where in the administrative process of investigation and clearance with Washington do these cases begin to falter? At the end of fiscal 1973, 23 of the 37 cases were being reviewed at the regional office level, 3 were being reviewed by the area desk chiefs in Washington, and 11 were being held in the Office of General Counsel. Of the 11 districts under review by the Office of General Counsel in Washington, 5 of them had been there more than a year:

Table 4
Time Lag for Processing Cases in
the HEW Office of the General Counsel

Time in OGC	No. of Districts
1 - 6 months	2 [84]
7 - 12 months	4 [85]
13 - 18 months	5 [86]

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[82] Supra, note 79.

[83] Investigations had been going on for an average of 33 months as of July 1, 1973.

[84] Colorado Springs, Colorado; and Pueblo City, Colorado.

[85] Flint, Michigan; Ulysses, Kansas; Pleasantville, New Jersey; and Springfield City, Ohio.

[86] Hartford, Connecticut; Stamford, Connecticut; Cahokia, Illinois; Lackawanna, New York; and Utica, New York.

The 3 cases being reviewed in Washington by the Office for Civil Rights desk chiefs, as of the end of fiscal 1973, had been there between two and four months,[87/] indicating very little lag at this point in the process.

The remaining 23 of the 37 cases were at the regional level. Some 13 of these 23 districts had been under review by the regional offices for more than two years as of the end of fiscal 1973.

Table 5
Time Lag in Processing
Cases in OCR Regional Offices

Time at Regional Office	No. of Districts
1 - 6 months	1 [88/]
7 - 12 months	8 [89/]
13 - 24 months	1 [90/]
25 - 36 months	4 [91/]
37 - 48 months	6 [92/]
49 - 60 months	3 [93/]

[87/] Atlantic City, New Jersey; Hoboken, New Jersey; and Perth Amboy, New Jersey.

[88/] Saginaw, Michigan. In January, 1973, OGC reviewed the Saginaw case after the regional office had worked on it since July, 1968, some 54 months. OGC returned it to the regional office around May, 1973, for further investigation.

[89/] Watsonville, California; Bemidji, Minnesota; Cloquet, Minnesota; Deer River, Minnesota; Detroit Lakes, Minnesota; Defiance, Ohio; Fremont, Ohio; and Leipsic, Ohio. All these districts represent relatively new cases.

[90/] Fort Lupton, Colorado.

[91/] Pomona, California; Delano Joint Union High School District, California; Delano Joint Union Elementary School District, California; and Hamilton, Ohio.

[92/] Maywood, Illinois; Ft. Wayne, Indiana; South Bend, Indiana; Lima, Ohio; Warren City, Ohio; and Racine, Wisconsin.

[93/] Joliet, Illinois; Passaic, New Jersey; and Canton City, Ohio.

In summary, the pattern seems to be that cases stay in the regional offices after initial on-site reviews for inordinate lengths of time. As will be explained later, sometimes the reason they remain there so long is for exhaustive investigation to meet the strict standards of the Office of General Counsel for clearance, and sometimes the reason is simply regional office procrastination. Once they do leave the regional offices, cases are quickly processed by the Desk Chiefs of the Office for Civil Rights in Washington before becoming bogged down again at the Office of General Counsel where delay tends to make the factual findings of the regional investigation obsolete.

Another key determinant in gauging OCR's alacrity in meeting its statutory responsibilities is the span of time between the dispatch of a letter of non-compliance to the district and settlement or the initiation of an administrative hearing. Twenty-two districts have received letters of non-compliance.[94/] Only four of them have been taken to an administrative hearing.[95/] The rest are either still negotiating or have reached some form of settlement.

[94/] Supra, note 68.

[95/] Wichita, Kansas; Boston, Massachusetts; Ferndale, Michigan; and Mt. Vernon, New York.

The average time lag from a determination of non-compliance to the scheduling of an administrative hearing has been 18 months.[96/] The average length of time between the hearing and a decision by the hearing examiner has been 7 more months. As of July, 1974, one case - Mount Vernon, New York - has gone to the hearing stage, but not further; two cases -- Ferndale, Michigan and Boston, Mass. -- have gone beyond this stage; and one district -- Wichita, Kansas -- negotiated an acceptable plan three months after the initial decision by the hearing examiner. In the Ferndale, Michigan case, it took 12 months for the decision of the hearing examiner to be affirmed by the Reviewing Authority. Even then, funds were not immediately terminated. Ferndale petitioned the Secretary of HEW to review the case. Several months later, the Secretary denied Ferndale's request for review. Ferndale then sought and obtained an additional month's stay of HEW's order cutting off funds in order to perfect its appeal for judicial review and to apply to the Sixth Circuit Court of Appeals for a further stay. Funds were finally terminated in June, 1972, some 42 months after the Office for Civil Rights had found the district in non-compliance. Ferndale is the only school district in the North and West which has had federal funds terminated.

[96/] The time measured is that between the sending of letter of non-compliance and the sending of notice informing the district of a hearing and an opportunity to be heard. The actual hearing must take place within 60 days after the notice is sent unless a delay is agreed upon by both parties. Because delays are mutually agreed to, there is an average lag of about 3 months between the time when the notice of a hearing is sent and the time the actual hearing begins.

Eighteen of the 22 districts found in non-compliance did not go or have not yet gone through an administrative hearing. Nine of the 18 were settled with the implementation of an acceptable plan to remedy the areas of non-compliance.[97/] The average length of time of negotiations before settlement was reached was 14 months.[98/] The remaining nine districts are still in the process of negotiating with the Office for Civil Rights.[99/] As of the end of fiscal 1973, the average length of negotiating time was 16 months.[100/] During the course of negotiations all school districts have continued to receive federal funds.

A final observation is needed with respect to the foregoing figures. Where average time spans are used they obscure the fact that many districts have been under review for even longer before receiving non-compliance letters, or have been negotiating with HEW for even longer before receiving notice of a hearing.

[97/] Berkeley, California; Kankakee, Illinois; East Chicago, Indiana; Evansville-Vanderburgh, Indiana; Ogden, Utah; Union Township, New Jersey; Middletown, Ohio; Penn Hills, Pennsylvania; and Shawano, Wisconsin. Ogden, Utah is included in this group, although the case was settled without the district implementing any plan.

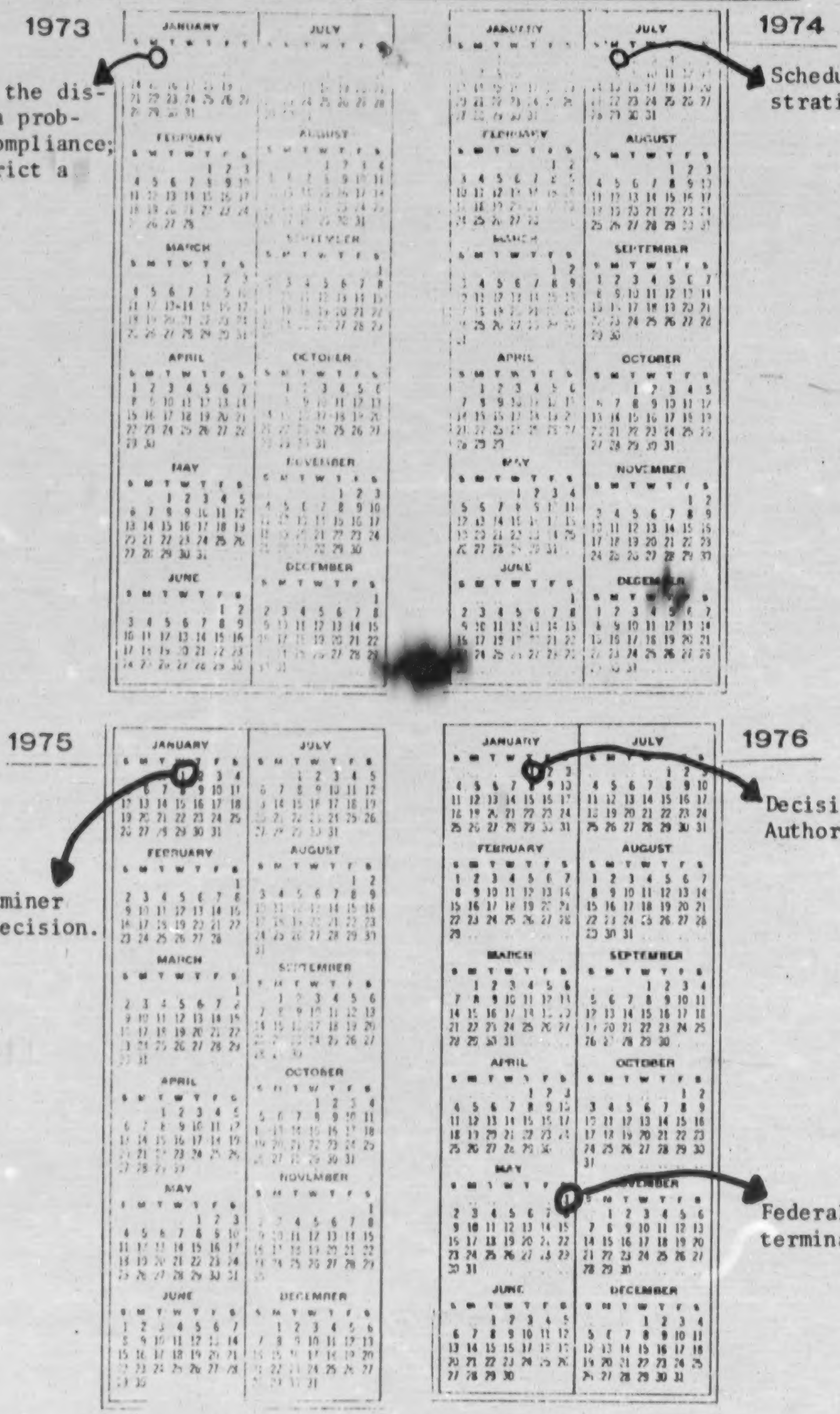
[98/] This does not include the amount of time between when the settlement was reached and when the plan was ultimately implemented. In some cases that accounted for an additional 4 or 5 months. The Ogden, Utah, case was closed 24 months after a letter of non-compliance was sent without any action being taken by the district. Evansville, Indiana, came into compliance not by HEW negotiations but rather only after private litigants brought an action in federal court and obtained relief in September, 1972.

[99/] Winslow, Tempe, and Tucson, Arizona; Bakersfield, Fresno, and Sequoia Union High, California; Garden City and Holcomb, Kansas; and Dayton, Ohio.

[100/] The most venerable of these cases are Bakersfield, California, and Dayton, Ohio, which have been pending for 47 and 29 months respectively without settlement or the scheduling of a hearing.

Chart 6

Average Time Lag in Administrative Enforcement Proceedings



Determines the district is in probable non-compliance; sends district a letter.

Schedules an administrative hearing.

Hearing examiner renders a decision.

Decision by Reviewing Authority rendered.

Federal funds terminated.

V. AN ANALYSIS OF SOME OF THE DEFICIENCIES IN HEW'S COMPLIANCE EFFORT

A widely accepted assumption concerning HEW's laggard performance is that political shackles have been placed upon the agency by President Nixon and his chief domestic policymakers. Politics unquestionably has played an important if incalculable role. But there are other, largely non-political, factors at work, as well. These include sloppy investigation work, bureaucratic caution, unbalanced staffing, and unrealistic requirements for clearing cases for action. The factors that have caused the compliance machinery to falter and foul up can be categorized under two general headings: (1) the failure of OCR to assert jurisdiction and investigate and (2) the inordinate delay or failure of HEW to act on evidence of discrimination.

A. *FAILURE TO ASSERT JURISDICTION*

1. The Choice of Which Districts to Review

The Office for Civil Rights has tended in recent years to choose safe districts for review and declined to assert itself in large urban districts where racial isolation is the greatest. This was not always the case.

Beginning in 1966, all districts were selected for reviews by the Washington office, and decisions were based mainly on whether a complaint had been received about a district. For example, HEW staff chose to initiate reviews in Chicago, Boston, San Francisco, Wichita, and Poughkeepsie, New York, because local groups such as the NAACP had sent in complaints.

When the volume of complaints increased, however, the small staff could no longer handle them and so new procedures were adopted. Beginning in 1967, all new complaints were forwarded to the Justice Department for resolution. No one in HEW knows how many school districts were complained about because the complaints were neither screened nor logged. What is known is that of all districts referred to the Justice Department, not one was subject to a Justice Department lawsuit before 1968, and only four were sued by the end of that year.[101]

It soon became evident that a systematic method of picking school districts was needed, dependent not on complainants but upon HEW itself. Regional offices were established in 1968 in New York, Chicago, Boston, and San Francisco, and regional staff was asked to suggest which districts in their areas should be selected for routine compliance reviews. Ultimately, selections were based on several factors. The districts had to have at least one school with an enrollment more than 50 percent minority; the districts had to be evenly spread among different states; and the districts had to be equally divided between Democratic and Republican congressional districts. And, most important, the district could not be so large as to tie up all the staff. Manpower was a serious problem until 1968 when Senator John Stennis added to the fiscal 1969 Labor-HEW appropriations bill language requiring that the northern staff be just as large as the southern staff.[102] Despite this provision however, until 1972, whenever there was a push in the South,[103] the extra staff were diverted from the North to help out.

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[101] Spangler v. Pasadena City Board of Education, filed Nov. 21, 1968, *supra*, note 27; United States v. School District 151, Cook County, filed April 25, 1968; *supra*, note 65; United States v. School District 189, St. Clair County, Civil No. 68-134 (E.D. Ill., filed Sept. 6, 1968); and United States v. Board of School Commissioners of Indianapolis, filed May 31, 1968, *supra*, note 66.

OCR maintains that it has been able to identify and conduct reviews in all districts in the North and West where significant civil rights problems exist. The fact is, however, that even allowing for OCR policy not to intervene in districts where litigation is pending, there are many cities in the North where large numbers of school children are racially isolated, but where the Office for Civil Rights has not conducted reviews to determine whether racial isolation is caused in part by actions of school officials, past and present.

Consider, for example, the following diverse group of northern and western cities in Table 6:

102/ Supra, note 15.

103/ Every fall until 1972, there had been a crisis in the South. For the fall of 1968, manpower had to be diverted from the northern effort to implement Green v. County School Board of New Kent County, 391 U.S. 430 (1968) which outlawed freedom of choice. For the fall of 1969, it was the Mississippi debacle with Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969) and a Supreme Court mandate to establish unitary school systems in the South "at once." For the fall of 1970, OCR had to have implemented the President's order to desegregate all the remaining southern school districts. In April, 1971, the Supreme Court handed down Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) which said that busing could be used to desegregate southern systems with schools that remained substantially disproportionate in their racial composition. The fall of 1971 was OCR's deadline to implement Swann.

Table 6

Racial Isolation in Public Elementary and Secondary Schools in Northern and Western Districts

Unreviewed City	Total Enrollment	Minority Pupils Number	Minority Pupils Percent	Percent Minority Pupils in 50-100 Percent Minority Schools
Santa Fe	11,916	7,703	64.6%	94.2%
Philadelphia	279,829	178,063	63.6%	90.4%
New York	1,140,359	703,902	61.7%	83.2%
Jersey City	38,430	23,439	61.0%	87.6%
Columbus	109,329	29,847	27.3%	72.9%
Youngstown	25,097	11,924	47.5%	93.0%
Akron	56,426	15,546	27.6%	63.1%
Albuquerque	83,781	34,936	41.7%	68.4%
San Diego	128,783	31,705	24.6%	72.6%
Pittsburgh	73,481	29,802	40.6%	75.6%
Cheyenne	14,218	2,196	15.4%	20.1%
Albany	10,999	3,785	34.4%	47.1%
TOTAL	1,972,648	1,072,848	54.4%	82.8%

Source: HEW/OCR Directory of Public Elementary and Secondary Schools in Selected Districts, Fall 1970 (1972).

It is evident from this table that OCR has not tackled a number of important northern and western districts, while it has conducted reviews in many small or overwhelmingly white districts (See Appendix B).

With limited staff and resources, OCR cannot conduct reviews on all big northern and western cities, of course. But its criteria should be revised so as to lead to early reviews in those districts with the largest numbers of minority children subjected to racial isolation, while postponing reviews in districts with few minority pupils. In some districts such as Newark and Oakland relief cannot be obtained short of metropolitan desegregation - a remedy OCR is forbidden by the Nixon Administration to employ. Nevertheless, there are many cities which OCR has not yet investigated in which relief could still be fashioned within the confines of school district boundaries. Since federal courts have found such segregation in northern cities,[104/] it cannot seriously be contended that *de jure* discrimination exists only in the peculiar batch of districts, most of which are medium and small, where OCR has conducted reviews.

2. Complaint Processing

OCR also fails to assert its jurisdiction in resolving the written complaints it receives from individuals and community groups. While complaints do not necessarily come from school districts where problems of racial discrimination are the most serious or pressing, the fact that a citizen or civil rights organization has complained of specific problems would seem to call for a considered response by the Office for Civil Rights, including investigation and a report on its findings.

[104/] See cases cited in note 27.

In fiscal 1973, the Office for Civil Rights' Education Division received a total of 498 complaints, according to the complaints logs of the ten regional offices. Of that number 177 (35 percent) came from northern and western states.

The complaints ranged widely, from one objecting to the use of an Indian as a mascot at a high school in Pocatello, Idaho, to a charge of racial discrimination in the discharge of a teacher in Dayton, Ohio.

Of 177 complaints, about 27 percent were resolved favorably for the complainants. Another 12 percent of the complaints were resolved by a finding of insufficient evidence of discrimination. A few of the cases took a long time to be resolved -- one took nine months, another 17 months. (Sometimes records were not clear either as to the date of the complaint or of its resolution.) At the end of fiscal year 1973, 113 cases remained open. Of these, 38 were relatively new (less than 90 days old). Fifty-three cases had been in the regional office more than half a year without being resolved. Ten complaints were over a year old, with no final action taken on them. (See Table 7).

Table 7
Time Lag in Processing Complaints
by OCR Regional Offices, Fiscal Year 1973

Status of cases	Number of cases
Closed at end of fiscal year	64
No date given	1
New (less than 90 days old)	38
4 - 6 months old	21
7 - 9 months old	37
10 - 12 months old	6
More than one year old	10
TOTAL	177

A review of the complaint processing procedure suggests that complaints are looked upon by OCR hierarchy and staff more as a nuisance than an aid, that the object is to dispose of the complaints with minimum staff time and effort, and that a complaint is officially "resolved" by supplying the complainant with the explanation afforded OCR by school district officials. There is also a tendency in OCR to question the complainant's knowledge of the facts or his motivation in filing the complaint. Often OCR's response does not fully answer the complainant's charges but glosses over the problems with bureaucratic language.

While complaint handling cannot be allowed to consume too large a portion of staff resources, OCR could still upgrade its complaint procedures to restore the confidence of complainants with legitimate grievances. More serious treatment of complaints by OCR might compel school officials to treat complainants' grievances less cavalierly, knowing that OCR would require a good faith effort to resolve them.

Since responding to complaints, letter writing and clearance through channels take time, OCR should encourage its staff to communicate freely with complainants by telephone. This would lead to a more accurate view of the grievances and their validity, and complainants could learn from OCR what action they may reasonably expect. A corollary is that the substance of all telephone conversations and agency actions should be adequately noted for future reference.

Since OCR is decentralizing its operations, transferring major responsibilities to regional offices, it is important that it continue the development of a uniform procedure for maintaining complaint logs begun in fiscal year 1974. The complaint log format should, at a minimum, contain adequate information about the nature of the complaint and each step taken by OCR toward resolving it. In teacher hiring and firing cases and in pupil discipline cases, it would be worthwhile to have a standard questionnaire for gathering additional information. The questionnaire should be used whether the information is sought by letter or by telephone.

Most important, a continuing qualitative analysis of the resolution of complaints should be made by OCR's Assistant Director for Planning to improve the follow-through and ultimate resolution of complaints. Outstanding initiative by single staff members should be rewarded. Resolution of complaints should become a challenge instead of a nuisance.

3. Suspending Enforcement Efforts While the District is in Court

Even in cases where OCR asserts jurisdiction it may not keep it until investigation and enforcement are completed. OCR regularly suspends investigation and negotiation efforts when school districts become primary litigants or are added as defendants to school desegregation suits. For example, the Westwood, Michigan, school district case[105] of OCR was suspended in 1972 when the district was included as one of several dozen districts in a possible metropolitan desegregation plan for the city of Detroit. The

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[105] Westwood, Michigan, is a suburb of Detroit. Its school system has 7 schools and an enrollment of 5000 pupils of whom 2000 or 40 percent are black. Only 24 percent of its 181 teachers are black.

Detroit school case, filed[106] in 1970, was not decided by the Supreme Court until July 25, 1974. Meanwhile in Westwood, Michigan, faculty hiring and assignment discrimination, de jure pupil segregation in three of the seven schools, and unequal educational services at these schools remained uncorrected, despite the fact that these probable Title VI violations were documented by OCR investigators nearly three years ago. It would in no way have impaired the Detroit case or been inconsistent with OCR's statutory responsibilities for OCR to have required the district to correct faculty discrimination practices and to take remedial steps to equalize educational opportunities for the schools at once.

OCR for the same reason suspended the investigations and reviews of two other suburban Detroit districts, Ecorse, a district of seven schools of which two are all-black, and River Rouge, a district of five schools of which two are all-black. Action has been similarly suspended in Buffalo, New York, and Dayton, Ohio. No justification for this policy is apparent.

4. Giving Cases to the Justice Department

The Office for Civil Rights has relinquished its jurisdiction over cases not only when private litigation has begun in the district but also

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106/ Bradley v. Milliken, supra, note 66. The District Court found Detroit's segregation was de jure and that the only feasible desegregation plan would have to involve suburban school districts. The Court of Appeals sustained this decision, but the Supreme Court reversed, holding that in the absence of a showing that a constitutional violation in one district had produced a "significant segregative effect" in other districts, there was no basis for metropolitan relief.

from time to time when the Department of Justice appeared to be interested in the district.[107] A total of five northern district cases which HEW originally investigated have been requested by the Justice Department (generally because HEW has persuaded Justice to request them): Pasadena, California; Waterbury, Connecticut; Kansas City, Kansas; Omaha, Nebraska; and Chicago, Illinois.

The progress in these five cases has been painfully slow. The Waterbury, Connecticut, case was given to Justice because Justice was looking for good factual situations involving disparities in facilities between black and white schools. Although the case was forwarded to Justice in

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[107] All school districts receiving federal funds are under the jurisdiction of HEW. The Justice Department may acquire jurisdiction over a school district in any of three ways. (1) The case may be formally referred to it by HEW, (2) Justice may request it, or (3) HEW may give it to Justice because a private party has subsequently brought suit against the district and the matter is in court. Formal referral has not been used in northern school district cases. The Justice Department may request a case from HEW under Title IV or Title IX of the Civil Rights Act of 1964. Under Title IV [42 USC §2000C-1], whenever the Attorney General receives a complaint of discrimination about a school district from a parent unable to initiate a legal proceeding, the Attorney General may bring suit against the district after giving it notice and a reasonable time to correct the problem. Justice used Title IV in its early northern school cases -- Indianapolis, Indiana, and Cook, Madison, and St. Clair Counties in Illinois -- and used Title IX [42 USC § 2000h-2] to intervene in the Oxnard, California, case on the issue of the constitutionality of a congressional enactment requiring postponement of some court orders requiring busing until appeals were exhausted. The third way Justice may obtain jurisdiction over a district is if the district is in private litigation. The Justice Department may intervene in any case of general public importance already in litigation. At least 41 northern and western school districts are either under court orders or are currently in court in suits brought by private litigants. More often than not Justice does not become a party in such cases, except as amicus curiae.

1968 and Justice filed suit in 1969, a consent decree was not entered until June, 1973, and the first stage of relief under the decree is not scheduled to be implemented until September, 1975.[108/] HEW forwarded the Kansas City case to the Justice Department because it feared that no hearing examiner would buck Downs v. Board of Education,[109/] a 1964 decision concerning Kansas City holding that the Fourteenth Amendment only prohibits purposeful discrimination, and that plaintiff had failed to establish that school authorities acted with racial intent in segregating students. Newer cases including Green[109a/] 1968, Swann[110/] 1971, and Keyes,[111/] indicate that a school board does not discharge its constitutional obligations by remaining neutral in the face of past discrimination. Although the Kansas City case was transferred to Justice in 1972, after Green and Swann, and Justice filed suit on May 18, 1973, after Keyes, the original complaint asked only for relief from faculty segregation, not pupil segregation. (It has since been amended.)

Omaha, Nebraska was another case of HEW's in which the Justice Department assumed enforcement responsibility. Despite the fact that HEW had completed an investigation of the district and cleared its findings with the

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[108/] United States v. Board of Education, Waterbury, Conn., supra, note 65.

[109/] Supra, note 23. Kansas City has a school system of 61 schools and 34,000 pupils of whom 11,000 or 31 percent are black. Of its 1400 teachers, about 300 or 21 percent are black.

[109a/] Supra, note 103.

[110/] Supra, note 103.

[111/] Supra, note 66.

Office of General Counsel, it took the Justice Department more than one and a half years to file suit.[112] The delays in these transferred cases can be attributed in part to the fact that despite HEW's lengthy investigations, the Justice Department has a policy of conducting its own investigations with personnel from the Federal Bureau of Investigation and its own attorneys. But even taking this into account, delays are sometimes extraordinary. In Chicago, the Justice Department took over enforcement responsibility from HEW more than half a dozen years ago. Fo[illegible]l these years, Justice has been negotiating two issues -- faculty desegregation and equalizing per pupil instructional expenditures -- but no settlement has been reached and Justice has not filed suit. No negotiations have taken place on the issue of student segregation.

However one assesses the record of the Justice Department in handling school desegregation cases, it does not appear that HEW's practice of voluntarily relinquishing jurisdiction can be justified on grounds that referral to Justice is a means to speedy and effective relief for children who have suffered discrimination. Indeed, the result is to permit federal aid to continue for years to districts in probable violation of Title VI, notwithstanding HEW's primary duty to see that discrimination is ended in programs which it funds.

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[112] Justice acquired the case in February, 1972, and filed suit on August 10, 1973. U.S. v. School District of Omaha, *injunction denied*, 367 F. Supp. 179 (D. Neb. 1973).

B. FAILURE TO ACT ON EVIDENCE OF DISCRIMINATION

The second major deficiency of HEW is its failure to act after evidence of discrimination is found.

1. Within the Office for Civil Rights

a) *Inadequate Compliance Reviews*

Once an OCR team visits a northern school district to look for evidence of discrimination, this is often just the beginning of a lengthy process. Sometimes investigators fail to explore fully all crucial areas of potential discrimination, and must make repeated requests for facts and explanations from the superintendent and even return to the district for further investigation. For example, in the case of Atlantic City, New Jersey, the OCR team began a review of the school system in October, 1971. The team did not complete the report until February, 1973, having to return repeatedly for bits and pieces of omitted data. Yet the three main problem areas of investigation -- discrimination in faculty hiring and assignment, the use of an ineffective freedom of choice plan for pupil assignment, and a meager vocational program -- are areas which in most cases can be easily documented and remedied.[113/] While repeated trips by HEW

[113/] In Atlantic City, New Jersey, where the nonwhite population increased 9 percent in each of the last 2 decades, the school system has 14 schools, two of which are predominantly white and five of which are virtually all black. The district enrollment is 68 percent black but only 38 percent of the 421 teachers employed there are black. Over 83 percent of the black teachers employed are placed in majority black schools. One third of the high school enrollment is drawn from three suburban communities, contributing to an emphasis on college-bound academic, rather than vocational, course offerings.

investigators are sometimes necessary when they are dealing in uncharted areas of non-compliance such as over-representation of minority children in "EMR" classes,[114] such delays seem inexplicable in the areas of teacher hiring and pupil assignment where the procedures for data gathering are well established.

Once the investigation is completed and the evidence documented, it is sometimes presented in a disjointed manner emphasizing trivial rather than important matters. The report written by the team who investigated the Utica, New York, school system is a prime example.[115] Reports are supposed to follow a classification system laid out in the OCR internal document called "Basic Components of a 441 Review." In Utica the HEW report was disorganized and treated minute areas in great detail, without relating them to the broad categories of non-compliance alleged: increasingly racially unbalanced schools, discriminatory recruitment, assignment and promotion of black teachers, and over-representation of minority children in special education classes. The result was predictable: the case became stuck in the Office of General Counsel, where it has now been sitting

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114/ Educable mentally retarded pupils (EMR pupils) are defined as those children who by reason of low mental abilities (I.Q.s 60-80) are unable to learn as rapidly as children of average intelligence and must be separated for teaching purposes.

115/ Utica, New York, is a city with a population of 100,000 in central New York State. Its school system consists of 22 schools and 14,500 pupils of whom 13 percent are black. Concentration of blacks in certain areas of the city has been accentuated by urban renewal, highway building and the location of public housing projects. Failure of HEW to secure compliance is particularly glaring, in view of efforts on the part of the state government -- including a partial fund cut-off -- to implement state policies against racial imbalance.

for more than a year. It will probably be sent back to the region for another try.

b) *Regional Office Delay*

As was statistically demonstrated on page 55, after evidence of discrimination has been found, HEW regional offices tend to allow investigations of school districts to continue for years. The Racine, Wisconsin, case illustrates this point.[116/] The Chicago regional office began investigating the Racine school system on December 15, 1969. Four days of preliminary investigation revealed enough evidence of discrimination to warrant a second visit on July 14 and 15, 1970. These investigations showed alteration of boundary lines between a black school and a white school and additions made to a black elementary school, resulting in the containment of blacks, to prevent them from being assigned to an adjacent white elementary school. The findings also indicated that the school board had fostered a racially identifiable faculty by allowing white teachers to transfer out of increasingly black schools and by assigning black teachers to black schools, and possibly also by discriminatory recruitment and hiring of black teachers. Disproportionate numbers of black children were relegated to special education classes, as well. Since July, 1970, the case has been held in the regional office, without any determination of non-compliance.

116/ Racine, Wisconsin, is a medium sized industrial city in southeast Wisconsin about 24 miles south of Milwaukee on Lake Michigan. Its school system has an enrollment of 32,000 pupils of whom 12 percent are black, while 4 percent of its 1,338 teachers are black. Of Racine's 47 schools, 5 have a black majority; 10 have no blacks whatsoever.

South Bend, Indiana, provides another example of delay after evidence of discrimination was found.[117] OCR conducted an on-site review of South Bend in October, 1969, discovering possibly higher per pupil instructional expenditures for white schools and repeated boundary changes that resulted in black pupils attending predominantly black schools, matters which clearly warranted further investigation. No further investigation was forthcoming. The case was classified as "dormant", and pupils in South Bend schools today face some of the same problems identified four years ago as possible violations of Title VI of the 1964 Civil Rights Act.

Similar delay was found in the New York regional office. Reviews of discrimination against Spanish-speaking children in three school districts in New Jersey -- Hoboken,[118] Passaic,[119] and Perth Amboy[120] -- have been stalled

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117/ South Bend, Indiana, is a medium large industrial city on the great bend of the St. Joseph River in Indiana about 75 miles east of Chicago and near the Michigan line. The city's public school system has 33,000 pupils of whom 19 percent are black. Twenty-one of the 46 schools are overwhelmingly white, 7 are majority black.

118/ Hoboken, New Jersey, on the Hudson River opposite lower Manhattan, is connected to New York City by tunnel and subway. Hoboken is a port of entry, a commercial and industrial center, and a manufacturer of food products, electrical equipment, and excavating machines. Its school system of nine schools has an enrollment of almost 8,000 pupils, more than half of whom are Spanish speaking with English language difficulties. Of its 350 teachers only 3 percent are Spanish American. Areas of possible non-compliance include the failure to hire enough Spanish-speaking faculty and the failure to include pupils with English language deficiencies in the educational program. Less than one-tenth of the Spanish-speaking children participate in the bilingual program.

119/ Passaic, New Jersey, is a medium size city eight miles north of Newark and is a textile and metal products center. Its school system of 11 schools has an enrollment of 8,500 pupils of whom 25 percent are Spanish-American and 32 percent black. Of 461 full time teachers, only 13 percent are black and one percent are Spanish-American. The district's non-compliance problems revolve around teacher assignment and inadequate educational opfor years. The Hoboken review was initiated in January, 1971. Eight additional visits were made to the system before the regional office completed a report and sent it to Washington in April, 1972. The Washington OCR headquarters returned it the same month to the regional office for more information, and additional site reviews were conducted in May and July. In November, 1972, the Washington headquarters sent the regional office a memo with a January, 1973, deadline for a revised report. The deadline was necessary, the memo indicated, to clear the way for a massive national origin review of New York City. The regional office completed the report in February, 1973, and again forwarded the files to Washington. No letter of non-compliance has yet been mailed to the district.

The Passaic review was initiated in April, 1969. No report of the review was written, pending submission of a desegregation plan ordered by the state. No acceptable plan was submitted, and the state made no attempt to secure one. In November, 1971, Washington sent the regional

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portunities for the Spanish-speaking students. Only the two smallest elementary schools offer bilingual instruction, although the Spanish-speaking enrollment is greater at other schools. All eight elementary schools are clearly racially identifiable, 70 percent or more minority or non-minority.

120/ Perth Amboy, New Jersey, is a small city 16 miles south of Newark, part of the port of New York, with copper smelting, oil refining, plastics and metal products, and manufacturing industries. Its school system of 12 schools enrolls 6,600 pupils, of whom 41 percent are Spanish American and 12 percent black. Three percent of the teachers are black and 4 percent Spanish-speaking. Perth Amboy has compliance difficulties in failing to hire enough minority teachers and failing to provide adequate educational opportunities to pupils not proficient in English, leading to a disproportionate drop-out rate among Spanish-speaking students. There is only one bilingual teacher.

office a memo asking the staff to renew its efforts. One year later Washington sent another memo requesting the regional office to complete the report by January, 1973. Washington still has not received the report and indications are that it will not be completed until sometime in 1974.

The Perth Amboy review began in June, 1969. A report was completed and transmitted to Washington in four months. The Office of General Counsel, however, returned it to the region for more information. At least six more visits were made to the district, and a revised report was sent to Washington in April, 1973, 3 1/2 years after submission of the first report. Several months later the district had yet to receive a letter concerning probable non-compliance.

The delays documented in these five cases are especially harmful because enforcement begins only after a non-compliance letter is sent. OCR's past conduct raises fears of further delays during the enforcement process. It is true that OCR encounters more difficulty in demonstrating that Spanish-speaking children are excluded from full and effective participation in the educational program than in establishing other Title VI violations. In contending that the district has failed to meet the needs of children with English deficiencies OCR is in essence questioning the educational judgments of the superintendent. To establish a case OCR staffers feel they must conduct a detailed in-depth probe, collecting diverse data from the cumulative records of hundreds of pupils, they must interview the special education director, the school psychologist, the personnel director, the curriculum director, and other officials about ability grouping, special education, and curriculum; and they must analyze the data statistically and qualitatively. But even granting these difficulties, there is little excuse for postponing the promise of relief for years, allowing the original work product to become stale.

2. Within the Office of the General Counsel

a) *The Bottleneck at OGC*

Failing to act on evidence of discrimination is not solely the fault of the Office for Civil Rights. Intimately connected with the conduct of OCR is the conduct of the Office of General Counsel. The Office of General Counsel insists that the OCR staff develop voluminous material to prove discriminatory actions by school officials. Moreover, once evidence is developed, OGC often returns the file to OCR after a long delay with the comment that the evidence is inconclusive or that the factual material has become stale. A few illustrations may suffice.

In the Dayton, Ohio, school case, investigators took about four months to amass strong evidence of discrimination in teacher assignments, inferior black facilities, and of less experienced faculties for black schools, but they ran into difficulty proving pupil discrimination. Of 69 schools in the Dayton system which has a 34 percent black enrollment, 22 schools are more than 95 percent white and 20 are more than 95 percent black. OCR investigators documented the racial segregation of pupils at intervals back to 1915, along with segregated faculty, discriminatory school site selection and building additions, and use of optional zones. But the Office of General Counsel insisted that the racial composition of _each_ school _each_ year from 1915 was "an absolute prerequisite to the presentation of a legally sufficient case" of _de jure_ segregation -- data only obtainable by a $57,000 contract with an automatic data processing firm.[121/] While hard information is needed to establish continuity of _de jure_ segregation from its origin to present, few private litigants would hesitate to pursue the case simply because they lacked the massive quantity insisted upon by OGC. Nevertheless, OGC felt that pupil discrimination could not be established without the extra data, and never made a decision whether or not to let out the $57,000 data processing contract. Eventually liberal members of the Dayton school board, a majority at that time, determined on their own that a desegregation plan was necessary and had a plan drawn up for adoption. They were promptly voted out of office. In January, 1972, the reconstituted board rescinded the liberals' resolution to implement the plan for pupil desegregation. Meanwhile, OCR's case remained stuck in the bureaucracy, finally necessitating a lawsuit by the local NAACP against the district in April, 1972 (although the teacher assignment and unequal facilities issues were resolved in 1970). After the law-

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[121/] Memorandum to J. Stanley Pottinger from Roderick Potter of the Civil Rights Division, OGC, "Use of Automatic Data Processing in the Investigation of the Dayton, Ohio Schools", October 2, 1970.

suit was filed, OCR suspended all activity on the case, pending the eventual outcome of the court case. The court granted interim relief five months later, some two years after OCR and OGC reached the impasse over the pupil desegregation issue.

Toledo, Ohio, a large industrial city on the Great Lakes, was visited by OCR in September and October, 1968. The school system consists of 74 schools and almost 62,000 pupils, of whom more than 16,000 (or 27 percent) are black. The regional office team completed and forwarded its report to Washington for analysis by OGC. The regional office found six grounds for holding the district in probable non-compliance; more than 80 percent of all newly hired black teachers were assigned to the 14 black schools; a special recruitment team was used to hire blacks for certain schools; all but one of the black principals and assistant principals were assigned to black schools; federal Title I ESEA funds were being used to equalize the black schools with the white schools instead of being used as supplemental funds; the curriculum at the black high school which enrolled more than half of all black high school students in the city was of lower quality than that of the other high schools; and the buildings and curricula in a black district annexed in 1968 were found to be inferior and inadequate. The case remained in OGC four years until January, 1973, when it was closed on the ground that there was "insufficient evidence of non-compliance." No reason appears either for the conclusion reached by OGC or for the delay in reaching it.

The inordinate delays in OGC often cause evidence to become too stale to act on. For example, in a memo dated June 19, 1972, the Education Division Director of OCR asked OGC what had happened on five cases forwarded to OGC a number of months earlier: reports on Hartford, Connecticut, forwarded to OGC by OCR on October 16, 1970; Stamford, Connecticut, forwarded on November 25, 1970; Lackawanna, New York, forwarded on February 2, 1971;[122] Utica, New York, forwarded on May 21, 1971; and Pleasantville, New Jersey, forwarded on Sepbember 16, 1971. At the end of 1973, OGC was still "reviewing" all these cases. No visit had been made to these districts by investigators since the time school opened in the fall of 1971. Action on these cases now would probably require new visits to the districts to obtain current data.

The Fort Wayne, Indiana, case illustrates another way that OGC delays enforcement action: by repeatedly kicking cases back to the regional office for more information. Fort Wayne is the third largest city in Indiana with a school system of 58 schools and 43,000 pupils of whom 16 percent are black. A preliminary survey of this system was conducted in August, 1968. The findings indicated that the district (a) selected sites for building elementary and junior high schools which tended to lock in segregation; (b) overutilized a white high school to avoid sending whites to a black high school which was under capacity; (c) hired a disproportionate number of white teachers in comparison with black teachers, concentrating the latter in a few black schools; and (d) used boundary changes, optional zones and selective busing of black students to foster pupil segregation. These findings were forwarded to Washington, where on October 21, 1968, OGC concluded that a reasonable possibility existed that the district was not in compliance. The Washington OCR office, with OGC's concurrence, directed the regional office to conduct a more complete review. OGC listed many kinds of information ostensibly needed to establish the case. A full scale compliance review was then conducted in April, 1969, by the regional office. In May, the results were forwarded to OGC in Washington, where they remained until November, 1970, at which time OCR reported that the file was stale and sent it back to the regional office for updating. A second on-site review was conducted from January to April, 1971. In June, the case was again referred to OCR in Washington, which again referred it to OGC. OGC reviewed it for the third time and again sent it back to the regional office for further investigation. The factual situation changed in the district and the case was referred to OGC for the fourth time in early 1972. At the end of 1972, it was sent back to the regional office for still more information. By the end of 1973, it was back in Washington being "reviewed" for the fifth time, and it is currently back in the regional office. The district has yet to receive a letter indicating it is in probable non-compliance.[123/]

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[122] On April 9, 1974, New York State Education Commissioner Nyquist ordered the school system of Lackawanna to integrate its schools asserting that efforts to develop a voluntary plan had failed. N.Y. Times (April 10, 1974) 39.

[123/] Within the last six months -- since the statistics were analyzed in Part II of this report -- HEW turned the Fort Wayne case over to the Justice Department.

Part of the delay at the Office of General Counsel can be attributed to a manpower shortage. This problem is most graphically illustrated by the effect it had on Cahokia, Illinois,[124] a small district where an on-site visit was made in September, 1969. A report, prepared for OGC in April, 1970, indicated a pattern of highly discriminatory pupil assignment and school site selection in the elementary schools, a failure to recruit enough minority teachers, concentrating the few hired in black schools, and busing black pupils past nearby white schools to more distant black schools. The case was assigned to an OGC attorney who was working on the high priority Boston case. The attorney left OGC after handling the Boston case, without ever getting around to Cahokia. The case was then assigned to another OGC attorney who has been fully occupied with a number of southern cases in which HEW was under court order to initiate enforcement proceedings.[125] The Cahokia case remains in limbo in OGC.

124/ Cahokia, Illinois is a small village on the Mississippi River just south of East St. Louis, Illinois, within the St. Louis metropolitan area. Cahokia is noted for its large prehistoric Indian earthworks which overlook the Mississippi. Its school system consists of 13 schools and 8,000 pupils, of whom about 18 percent are black.

125/ These cases are known as the "Pratt cases" because on February 16, 1973, in Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1973) *supra*, note 49, federal district court Judge John H. Pratt ordered HEW to commence enforcement proceedings against 74 southern school districts found in non-compliance in 1971 or which had reneged on their desegregation plans, and to commence proceedings against 42 other southern districts in probable non-compliance with *Swann*. This unprecedented order turned the usually dormant HEW enforcement machinery from a cold start to full throttle, at least temporarily.

In January, 1973, the U.S. Civil Rights Commission indicated in a report[126] that the size of the legal staff of OGC had not kept pace with the growth of the investigative staff of OCR. While the OCR staff climbed from 278 to 1967 to 708 in 1972, the OCG civil rights division staff increased from 17 to 19 attorneys, with only between three and seven actually working on school desegregation.[127] OCR, recognizing that inadequate legal support has blunted its enforcement effort, asked for and received funding for 16 more attorneys for fiscal 1974,[128] 11 of whom are in the regional offices, 5 in Washington; none works solely on education cases. No further increase was requested for fiscal 1975.

b) *Legal Problems*

While a manpower shortage in OGC is part of the problem, the main cause for delay in OGC is the quantum of evidence that OGC feels is necessary to meet the burden of persuasion in each northern and western school case. Under general principles of law, OCR bears the burden of persuasion as to issues of pupil segregation or other Title VI violations. OCR must convince the hearing examiner of the existence of each violation which it alleges.

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[126] United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort -- A Reassessment (1973).

[127] Id. at 202-3. The OCR staff figures cited include not only the Education Division of OCR but the other three divisions as well: Contract Compliance, Health and Social Services, and Higher Education.

[128] Hearings on Departments of Labor and Health, Education, and Welfare Appropriations for 1974 before a Subcommittee of the House Committee on Appropriations, 93d Cong., 1st Sess. pt. 5 at 924 and 930 (1973).

All that is needed, however, is a preponderance of evidence to convince the trier of fact, even though there may be lingering doubts or uncertainties. No mathematical ratio or quantum of evidence is required. It is sufficient if OCR's case is stronger than the district's defense, "though the scales drop but a feather's weight."

The Office of General Counsel, however, differs radically with this fundamental principle of law. OGC's attitude is best revealed in the Office for Civil Rights' training materials:

> A strong factual base is essential to any case and is even more essential in a Title VI case where the burden of proof is carried completely by the Department. Even in southern cases, where Swann has shifted the burden of proving one-race schools in formerly segregated systems are discriminatory to the school district (sic), HEW will continue to present the facts as if the burden was on the Department. 129/

Instead of adopting the preponderance of evidence rule, OGC insists that the evidence be sufficient to create a virtually airtight case. To authorize the dispatch of a letter of probable non-compliance, the case must be not just convincing or highly probable but free of lingering doubt or uncertainty. Similarly, for OGC to take a case to a hearing after negotiations have failed, it insists that a preponderance of evidence is simply not enough. The evidence must be so overwhelming as to exclude reasonable doubt.

129/ Translated, this means that while the Swann case said that the continued maintenance of one-race schools in formerly dual school systems created a presumption of discrimination, shifting the burden to the district to prove there was no discrimination, HEW would continue to treat the burden as its own. The quotation comes from that portion of OCR's training materials entitled "Investigation of Title VI School Cases from the Attorney's Standpoint."

One result of this policy is that OGC has never lost a northern school district case. But another result is that OGC has imposed unnecessary data-gathering burdens and unncesssary delays on OCR, as documented above. And as a further result, OGC has been reluctant to take good cases to a hearing. One example is the Mount Vernon, New York, case.

Mount Vernon is a city sandwiched between New York City and the city of Yonkers, New York. Its school system has 18 schools of which 12 are majority black and an enrollment district-wide of 11,800 pupils, of whom 7,275 are black. The New Haven railroad, which runs under the streets across the town, marks the boundary between black and white communities. Economics and racial pressure have prevented the black population from living on the north side of town. As a result of a preliminary review conducted in December, 1969, and a full-scale review conducted in October and November, 1970, OCR sent the district a letter in March, 1971, informing it that it was in non-compliance because (1) it had failed to recruit, hire, assign, and promote minority teachers on a non-discriminatory basis, (2) it had maintained schools in the southern part of the district attended by blacks which were inferior in facilities to those attended by the majority of white pupils, and (3) it assigned children on a neighborhood basis when housing had historically been based on race. The evidence compiled to arrive at these findings consisted of a report of more than 100 pages and backup documents and files about three feet thick. The evidence seemed solid enough: 85 percent of all minority teachers were assigned to black schools. There were no minorities in the central administration. Minority teachers constituted only 17 percent of the faculty while minority students comprised 58 percent of the enrollment. While the schools south of the tracks were built as white schools and became black as whites moved out, three new replacements for the northern schools were made in the last 20 years but only additions were made for the southern schools. One zone change could be attributed to racial motivation. Two desegregation plans proposed by the school board, one in March, 1966, to bus elementary pupils, and one in October, 1968, to create a middle school for all pupils in grades 7 and 8, were subsequently repudiated. And the district had been waging a costly ten year battle against the State Commissioner of Education, who had ordered the district to desegregate. The district alleged that the plan to desegregate by pairing was financially infeasible.

In June, 1971, the superintendent began stalling. Recognizing this, OCR forwarded the case to OGC for formal enforcement action. OGC could have promptly taken the district to a hearing, but instead OGC and OCR sent the superintendent a second letter indicating a willingness to talk. Another school year began, and OCR waited until January, 1972, to visit the district to check on any changes that might have occurred in the interim. Another letter was sent noting that the improvements made were not sufficient. The district decided to fight. It hired consultants to prove its black and white facilities were equal. OGC then recommended another visit to check further on improvements and to gather more information. The consultants' report so impressed OGC that it felt compelled to hire a consultant of its own. After a delay in obtaining one, the HEW consultant visited the district in the fall of 1972 and issued his own report some months later. Finally, in August, 1973, after two years of delay, OGC took the case to a hearing. In December, 1973, the hearing examiner found the Mount Vernon school system not in compliance with Title VI. While the system pursues its appeal, it continues to receive about $2 million a year in federal funds.

In addition to delaying enforcement proceedings, the pursuit of overwhelming evidence has overburdened regional staff investigators, requiring extra manpower and time to collect voluminous data. The unduly long delays encountered in many districts such as Fort Wayne, Indiana; Tucson, Arizona; Bakersfield, California; Colorado Springs, Colorado; and Flint, Michigan; for example, have been caused in part by the repeated insistence by OGC that minor gaps and small loopholes in information already compiled be filled so no lingering doubts remain.

A second legal problem is reluctance of the Office of General Counsel to take advanced legal positions or to venture outside clearly defined limits of school desegregation case precedents, despite the fact that this is one of the most rapidly developing areas of constitutional law. The OCR training manual section on legal matters states OGC policy: "No new law will be made in the enforcement of . . . cases pursuant to Title VI."

In fact OGC is even unwilling to use precedents already available. Another section of the training manual flatly declares: "Some of the recent cases go beyond . . . the position of the Department."

On one score, OGC cannot be faulted: the refusal to rely on stronger state racial imbalance laws instead of Fourteenth Amendment case law to define the requirements of Title VI. In February, 1971, OGC at the urging of OCR flirted with the idea of basing Title VI enforcement in New York on standards supplied by New York state's racial imbalance policies.[130] If a school district could be held to a stricter standard under state law, OCR thought its job of data gathering would be simpler, speeding the enforcement process. Congress has thought otherwise, however, and attached provisions to HEW appropriations bills since 1970 to effectively prohibit HEW action to require a district to achieve racial balance, even though state law might require the district to do so.[131]

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[130] New York Executive Law §291(2), as interpreted and implemented by the Board of Regents, under authority of Education Law §§207, 301, 305, and 310. There are or have been laws and administrative policies in other states such as New Jersey, Illinois, Pennsylvania, and Massachusetts where this idea might also have been used.

[131] Departments of Labor, and Health, Education, and Welfare, and Related Agencies Appropriation Act, 1970, §§408 and 409, 1970, U.S. Code Cong. and Admin. News, 44; Office of Education and Related Agencies Appropriation Act, 1972, §§309 and 310, 1971. U.S. Code Cong. and Admin. News, 118, Education Amendments of 1972, §§801 and 802, 20 U.S.C.A. §§1651 and 1652 (1974). OGC subsequently showed no readiness to adopt the theory that just as federal courts sometimes apply the law of the state in which the court is located, so HEW could apply state law to fill the void left by the lack of binding federal guidelines. This theory confuses the distinction between cases which merely lack federal rules and regulations and cases in which there are no such rules and regulations but federal rights are nonetheless involved. Federal courts apply state substantive law only on non-federal questions. Where federal rights are involved, as with Title VI, there is no choice of law. Federal law alone applies, in accordance with the supremacy clause of the Constitution.

OGC probably pursued a wise course in not applying state standards to Title VI enforcement in states with racial imbalance laws. But there is little reason for OGC to ignore or to refuse to rely on recent Constitutional precedents in federal courts which could ease OCR's task of finding discrimination. For example, in Davis v. School District of the City of Pontiac,[132] the federal district court found the school system had built ten additional elementary schools and made twelve changes in zone boundaries since 1954, actions ostensibly taken by the school board without regard to race but which more often than not tended to perpetuate the effects of private residential segregation. In describing the duty of the school board in such a situation and what is necessary to find *de jure* segregation, the court said:

> When the power to act is available, failure to take the necessary steps so as to negate or alleviate a situation which is harmful is as wrong as is the taking of affirmative steps to advance that situation . . . . Where a Board of Education has contributed and played a major role in the development and growth of a segregated situation, the Board is guilty of *de jure* segregation . . . . The Board of Education cannot absolve itself from responsibility for this situation when it had the power, duty, and control to prevent the situation . . .. For a school Board to acquiesce in a housing development pattern and then to disclaim liability for the eventual segregated characteristic that such pattern creates in the schools is for the Board to abrogate and ignore all power, control and responsibility.[133]

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[132] *Supra*, note 27.

[133] 309 F. Supp. 734 at 741-2.

In affirming the district court, the Sixth Circuit Court of Appeals echoed the district court's language, adding that while bare statistical imbalance is not forbidden, all that is necessary is a quantum of official discrimination in order to invoke the protection of the Fourteenth Amendment.[134/] The appeals court then reviewed the evidence showing that school location and boundary line decisions more often than not tended to perpetuate segregation and concluded that while each decision considered alone might not compel the conclusion the Board was fostering segregation, taken together they supported that conclusion.

Contrasted with the court's treatment of what is required to find *de jure* segregation is the treatment by the Office of General Counsel of the same issue in Ogden, Utah. The Ogden school system has 28 schools and 15,163 pupils of whom 1,783 are Spanish American. Although the district is 85 percent Anglo white, several elementary schools were predominantly minority. In August, 1970, the superintendent was sent a letter of probable non-compliance because the district maintained three racially identifiable schools -- Grant 82 percent, Pingree 81 percent, and Hopkins 65 percent minority -- and because, due to the construction of Jefferson and and the closing of Grant and Pingree, the district was making boundary changes effective fall, 1970, which would establish Jefferson's student population as more than 2/3 minority.[135/] On October 11, 1972, in an OGC memo

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[134/] 443 F.2d 573 (6th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971). See also cases cited *supra*, notes 25, 26, and 27.

[135/] Additional evidence included the facts that less than 1 percent of teachers are Spanish surnamed, less than 2 percent are black. These few are concentrated in the heavily minority schools, there is no minority recruitment, and ESEA Title I funds were used to supplant, not supplement resources for poor children.

that was partly responsible for the case being dropped, a staff attorney indicated considerably more was necessary to establish a case of de jure segregation.

> [I]t is uncertain whether the increased isolation was due to the zone changes or changing housing patterns or both. No evidence of discriminatory intent is cited. Most of the boundary changes over the years were to relieve overcrowding and affected white schools. If the district has made zone changes which are justifiable under racially neutral criteria and in all but 2 or 3 cases application of these criteria had no segregatory effect, it will be hard to even make a racial effect argument.
>
> During the period of rapid growth, from 1947 to 1963, 3 elementary schools were overcrowded and became racially identifiable. However, there is no information on underutilization in white schools during this period or on how the district dealt with it.
>
> Jefferson Elementary opened 71% minority. However, it is the only school that ever did so. Although site selection in a poverty stricken neighborhood is very suspicious, no evidence is cited to indicate that if the district had consistently followed the criteria it used for location of other schools or racially neutral criteria, the school would have been located elsewhere . . . . I think we will have to produce some evidence that the district was not motivated by neutral principles in locating Jefferson and I don't think that the racial composition at opening is enough.

In addition to ignoring case law which goes beyond positions taken by the Department and to requiring overwhelming amounts of factual evidence of pupil segregation before proceeding against a school district, the Office of General Counsel impedes Title VI enforcement efforts in relation to faculty composition.[136] OGC has never developed a policy for discerning violations in northern school districts that have historically lacked minority teachers. In the South, since teachers as well as pupils were segregated by law, the desegregation of the faculty was always a part of the remedy for the desegregation of pupils, because the right to a desegregated education includes the right to a desegregated teaching staff. HEW's investigatory task was relatively simple: to show statistically that black teachers were concentrated in black schools, and therefore to require implementation of the Singleton ratio at each school.[137] In the North, however, no state law existed from which to draw an inference of past discrimination. Nor was Singleton always the appropriate remedy, since the problem is often less one of faculty segregation than of failure to hire enough minority teachers in the first place. OGC has never determined what is "enough," that is, whether it is the same ratio as the ratio of black to white population in the community, or the ratio of black to white pupils enrolled in school, or whether it should be based on an estimate of the available minority workforce or on a showing of good faith efforts at recruiting minority teachers. Instead, OGC has asked investigators to look for evidence of differential treatment of minority teachers and tried to link such treatment to a discriminatory effect. Without using a statistical norm, OGC tries to establish Title VI violations by showing that black teachers seem to be assigned mostly to black schools or that blacks seem not to be recruited as much or promoted as frequently as whites. The lack of a norm makes OCR's job much more difficult.

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[136] OGC enforcement activity against teacher discrimination is based on the theory that teacher discrimination has a discriminatory effect on pupils. Title VI does not cover discriminatory "employment practices .... except where a primary objective of the federal .... assistance is to provide employment." Civil Rights Act of 1964, §604, 42 U.S.C. §2000d-3 (1964). In 1972, Congress amended Title VII to prohibit discrimination in State and Local employment. The Office of Management and Budget has recently assigned responsibility for preventing faculty discrimination to the Equal Employment Opportunity Commission and HEW has stopped "duplicating" the collecting of racial data on faculty. This demonstration of management thinking has wasted money and delayed Title VI enforcement. EEOC collects faculty data on forms that are gradually forwarded to OCR, where months later they are filed in the separate folders of more than 7,000 school districts. Whereas faculty data used to be available in late fall, since it was collected with pupil data on Form 101 and 102s, the OMB's zest for eliminating duplication of data collecting has not only wasted many clerk-hours, but it has also made important information unavailable for an entire school year.

[137] Supra, note 40.

c) *Time Lag in the Federal Fund Cut-off*

Even after the Office of General Counsel is satisfied that it has enough evidence to meet the burden of persuasion in a given school case, it may take a long time to subject a school district to the real possibility of federal aid termination. To this point, our discussion has primarily dealt with the time-lag between HEW's initial entry into a district and the dispatch of a letter of probable non-compliance, or between the date of the letter of non-compliance and the commencement of a fund-termination hearing after negotiations fail. But there is further delay later on, between the time HEW goes to a hearing and the time when federal funds are actually cut off. While four districts -- Wichita, Boston, Ferndale, and Mt. Vernon -- have been taken to a hearing, only one -- Ferndale -- has had its funds terminated. Wichita negotiated an acceptable plan after the hearing examiner ruled adversely to the district; in Boston the administrative Reviewing Authority has affirmed the hearing examiner's determination of non-compliance, and in Mt. Vernon the hearing examiner has issued a decision of non-compliance, but no further action has been taken.

The Ferndale case was relatively simple, but it took a long time to terminate the federal aid. Ferndale had built an all black elementary school 46 years ago and had restricted it to blacks ever since.[138] All but a few of the district's 400 black elementary pupils were assigned to this school, although there were nine other elementary schools in the system. Similarly, black elementary teachers were concentrated in this minority school. Below is a chronology from first review to final action:

FERNDALE

October, 1968	--	initial review held
November, 1968	--	report written
December, 1968	--	letter of non-compliance sent
(date unknown)	--	district notified of a hearing
July and September 1969, and April, 1970	--	hearing held
September, 1970	--	hearing examiner finds the district in non-compliance
December, 1970	--	Ferndale files request for review
September, 1971	--	on appeal, the Reviewing Authority affirms

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[138] The school, Grant, was one of 12 schools in a district whose overall enrollment of 8,138 pupils of whom 10 percent were black. The district is in a small city with the same name located just north of Detroit. With a population of 31,000, the city is a center for the manufacture of auto parts, paint, and metal products.

November, 1971 -- OGC recommends Secretary decline to review

April, 1972 -- Congress notified of cutoff to be effective in 30 days

May, 1972 -- Secretary of HEW delays termination for 30 days to allow the district to perfect a petition for judicial review and to apply to the Sixth Circuit Court of Appeals for a further stay of the HEW order

June, 1972 -- order of termination becomes effective.

Federal funds were terminated in June, 1972, when the Sixth Circuit denied the district's request for a stay of the HEW order.[139] Nevertheless almost theee years elapsed between the time the administrative hearings began and the time the cut-off eventually came. It is not known why the hearing examiner took 5 months to decide the case, why the Reviewing Authority took 9 months to affirm, and why the Secretary of HEW took 5 months to decide not to review the case and then extended the cut-off date an extra 30 days. The practical effect of these actions, however, is clear. The message to Boston and Mt. Vernon school officials and others is that even after formal enforcement has begun there is no reason to fear an imminent cut-off of federal monies.

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[139] *Supra*, note 61.

C. POLICY CONSIDERATIONS

While HEW's failure to enforce school desegregation requirements is often attributed to political considerations, this report has shown that other considerations weigh heavily. But in one area - busing - politics has dominated OCR actions. The furor over busing as a means to desegregate schools has repeatedly surfaced as an emotional political issue in recent years. It reached new heights in April, 1971, when the Supreme Court in Swann v. Charlotte-Mecklenburg Board of Education[140/] ruled, that the use of non-contiguous school zones and the busing of pupils are permissible tools for desegregatins schools. The Nixon Administration had fought the case since 1970, when the Justice Department filed an amicus brief suggesting that the district judge had committed an abuse of discretion by ordering an "extreme" busing plan. But the Supreme Court, Mr. Nixon's own appointees included, unanimously overrode Administration objections.

The first test of how the Administration would react to Swann came a month later in the Austin, Texas, school desegregation case.[141/] The federal district court ordered the Justice Department to submit a plan for desegregating Austin schools and Justice turned to HEW's Title IV office for tech-

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[140/] Supra, note 103.

[141/] United States v. Texas Educational Agency, Civil No. 70-80 (W.D. Tex. filed Aug. 7, 1970), 467 F.2d 848 (5th Cir. 1972).

nical assistance.[142] The plan developed by the Title IV office did not require racial balance as the Charlotte-Mecklenburg plan had but did provide for extensive transportation, necessitating the purchase of 100 school buses. The plan was screened and cleared by HEW Secretary Elliot Richardson, Attorney General John Mitchell, and two White House representatives, Edwin L. Morgan (an assistant to John Ehrlichman) and Special Consultant Leonard Garment. In July, the plan was submitted to the court, but the district judge rejected it in favor of a legally inadequate one drawn up by the board. The acid test then became whether the Justice Department would appeal.

On August 3, 1971, the Justice Department did appeal, but only after an extraordinary act of intervention by the White House. The White House made it known that Justice was disavowing the HEW plan in the course of its appeal. The President issued a statement asserting that he was against busing and had instructed Messrs. Mitchell and Richardson to have government officials hold busing to a minimum.

Three days later, Alabama Governor George Wallace announced that he would run for President in 1972 and that busing would be an important campaign issue. Mr. Wallace goaded the White House by sending a telegram urging the President to seek a Supreme Court ruling that busing for racial balance was unconstitutional. The White House responded on August 11, when

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[142] Pursuant to Title IV of the Civil Rights Act of 1964, 42 U.S.C. §2000c-3 (1964), HEW set up the Division of Equal Education Opportunity, whose task it was to render technical assistance to school districts in preparing and implementing plans for desegregation.

Press Secretary Ronald Ziegler, in a statement to newsmen for the President, unveiled a strongly worded threat which rippled through government halls, especially those of HEW. He announced that government officials would lose their jobs or be transferred elsewhere if they went counter to the President's wishes by seeking to impose busing on school districts.

The effect these actions had on the northern school desegregation efforts of HEW is exemplified by what happened in the Evansville-Vanderburgh County, Indiana, case. Evansville is a city of 139,000 located in the southwestern tip of Indiana on the Ohio River. Its city-county school system has 42 schools with an enrollment of 34,000 pupils, 9 percent of whom are black. Until the time of the Austin busing plan reversal and the Ziegler threat, the Evansville school board had been under pressure. The board had received a letter of non-compliance in July, 1971 indicating that transfer policies had perpetuated the effects of segregated housing and school segregation by state law. Thus, of 37 elementary schools, nine were entirely white, ten or more were over 99 percent white. One of the elementary schools, Lincoln, was 99.8 percent black, retaining its original segregated status. Two other elementary schools, although not originally black, had now become so by allowing whites to transfer out. Further, there was racial discrimination in the assignment and promotion of black teachers. The Chicago OCR regional office persuaded the board to draw up a plan to be implemented by September 1. The plan, never publicly disclosed, called for the use of busing to bring all of the system's schools, not just the three black schools, into racial balance.

Then on August 3, President Nixon issued his statement disavowing the HEW drawn-up busing plan for Austin and ordered federal administrators to hold busing to the "minimum required by law," followed by the threat a week later. The Evansville school board thereupon withdrew its busing plan and sat back, waiting for OCR to react. School opened with no new desegregation plan. The case remained under study by OCR in Washington. Finally, in October, OCR Director J. Stanley Pottinger announced that no busing was necessary and that an exchange of students between Lincoln and two neighboring white schools within a radius of 1.2 miles was acceptable. The other black schools were to be closed, and the pupils to be dispersed to various white schools. No deadline was set for effecting the plan, despite the Supreme Court's admonition in Alexander v. Holmes County Board of Education for de jure segregated districts to desegregate "at once." Although the plan was formally adopted in November, the school board decided not to implement it in January, the beginning of the second semester, but to wait until the following September. Outraged members of the black community filed suit in federal court, but in May, before the issue came to a hearing, the school board adopted a more progressive revised plan and the parties filed a stipulation of dismissal of the suit. Then in August, 1972, a reconstituted school board rescinded the revised plan. Plaintiffs hurriedly re-opened the case and by September, 1972, got

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143/ 396 U.S. 19, 20 (1969).

the court to reinstate the May plan, with orders to prepare a final county wide plan by January, 1973.[144/] In short, Presidential politics deprived Evansville's black children of their constitutional rights for an additional school year.

The controversy over busing, however, does not provide an adequate explanation for HEW's pervasive default in Title VI enforcement. Transportation is irrelevant to eliminating such violations as within-school discrimination, teacher segregation, and the unequal provision of school facilities. As for student assignment, in many cities much can be accomplished with little or no increase in transportation of pupils. A 1971 study commissioned by HEW concluded that "almost complete elimination of segregation in the schools seems possible without exceeding practical limits for student travel. [I]n most school districts very substantial decreases in racial isolation can be accomplished without transporting any student who could otherwise walk to school."[145/] Cahokia, Illinois, is a prime example in our study (p. 83, above) of a city where Title VI violations could be eliminated with no increase in transportation of children. Not only are 70 percent of students already transported by bus, but transportation is now used as a tool to further a pattern of discrimination.

[144/] Supra, note 66. The May court-ordered plan desegregated the three schools with high concentrations of black students. Under the more comprehensive 1973-74 plan, only one school in the Evansville-Vanderburgh County school system has as many as 20 percent minority pupils, and only one school remains entirely white.

[145/] School Desegregation With Minimum Busing: A Report to the Assistant Secretary for Planning and Evaluation, U.S. Dept. of Health, Education, and Welfare, Dec. 10, 1971. Lambda Corporation, 4.

VI. CONCLUSION

The theme that emerges from this investigation of HEW's performance of its legal duty to enforce the law of school desegregation in the North and West is that of *delay* -- delay that has resulted in an effective denial of the fundamental rights of hundreds of thousands of children, and the granting of millions of dollars in federal tax funds to the school districts denying these rights.

This bleak picture emerges *twenty years* after the Supreme Court in *Brown v. Board of Education* declared that "in the field of public education, 'separate but equal' has no place"; *ten years* after Congress enacted Title VI of the Civil Rights Act of 1964, an expression of national dismay that constitutional rights were still widely denied and a mandate to HEW and other agencies to aid the courts in securing prompt and effective remedies; and *five years* after *Alexander v. Holmes County* in which the Supreme Court made clear the obligation of every school district to terminate *de jure* segregation "at once."

Segregation that violates the Constitution and laws of the United States is not confined to school systems south of the Maxon-Dixon line. If any doubt existed on this question, it was removed by the Supreme Court's decision in *Keyes v. School District No. 1, Denver, Colorado* capping and confirming a host of lower federal court decisions which found *de jure* segregation in schools in the North and West. Thus, *Alexander's* urgency reaches into the North and West as well. But the command for immediate relief has not been implemented in HEW's offices of Civil Rights and General Counsel. Semesters slip into years and then into more years. Investigations may continue for three years before a district is advised that it is not in compliance with the law. Yet another year may pass before an acceptable plan is negotiated or negotiations are abandoned as fruitless. It may take 5 more months before the district is taken to a hearing. After the hearing is held, a year and a half may elapse to negotiate compliance, or to conclude the appeals and finally terminate federal funds. As a result of these massive delays, only a handful of children in the North and West have won their right to equal treatment in public schools through the efforts of HEW in the ten years the Civil Rights Act of 1964 has been in force.

When we began this investigation we wondered whether the lack of enforcement action in the North and West was attributable to the rarity of de jure segregation outside the South, to the failure of HEW to investigate it adequately, or to HEW's failure to act upon violations its staff has found. The question has now been answered. While a few staff investigations have been shaky, HEW's files literally bulge with documented evidence of violation of laws. This includes not only the assignment of children to segregated schools, but discrimination in the hiring and assignment of minority teachers, discrimination in the classifying and assigning of children to classrooms and failure to assist minority children with language difficulties or special learning problems.

HEW officials are aware that the evidence of violations of law exists; that is why they have failed to close files, in some cases years after the investigation began. Such paralysis in the face of this knowledge is a bureaucratic disease - whose consequences, unfortunately, afflict not bureaucrats but children.

Apart from delay, HEW's northern school program is marred by the failure to set appropriate priorities in the choice of districts to be investigated. Of the eighty-four northern and western school systeme reviewed by HEW, 2/3 have total enrollments of less than 20,000 pupils. The agency has failed to conduct investigations in such cities as Los Angeles, Cleveland, Philadelphia, Milwaukee, San Diego, New York or Pittsburgh, where a very large portion of black children in this country reside and attend racially isolated schools.

It is true that HEW's first ill-prepared venture into Chicago was a disaster, but the Department has had ample time to recover. It is true also that the desegregation of very large school districts is a complex process, but it was not very long ago that the courts were able to cut through complexity to desegregate Prince Georges County, Maryland, the tenth largest school system in the country, after years of delay by HEW. And it is true that in some, but by no means all, large cities effective school integration can be accomplished only by crossing district boundaries, and that in the one case it has decided the Supreme Court has not found a factual basis for ordering this highly controversial step. But only a few years ago in dealing with "freedom of choice" plans, HEW civil rights specialists developed factual material and legal guidelines that helped convince the courts that broader remedies were required in the South.

The drastic political limitations placed on busing by President Nixon and his White House staff, constitute the most prominent and publicized barrier to the agency's fair enforcement of the civil rights laws. And there is little question that the Nixon Administration's negative policy declarations have impaired enforcement action and demoralized the HEW civil rights staff. But political restraints are only part of the explanation of HEW's dismal performance.

A vigorous dedicated agency staff, committed to carrying out its statutory mandate, will test to the limit the constraints it operates under. This has not happened at HEW; integration that might have been brought about without raising a political storm has not occurred because the cases have never been brought to the point of decision. The fact is that as HEW's civil rights program has grown older it has become increasingly bureaucratized. The bottleneck on northern school cases in the Office of General Counsel, the failure to set goals and priorities that would focus agency effort on the larger issues, the inability to establish deadlines and to resolve matters that have been pending for many years are symptoms of a hardening of agency arteries. While the agency complains of insufficient staffing, the fact is that it has failed to act promptly to fill positions funded by Congress and that many man-hours are spent on trivial tasks and far-flung OCR conferences of questionable importance to the primary goal: enforcement of Title VI.

As HEW's civil rights staff has grown, its work product appears to have diminished. Indeed, it is only the court order in Adams v. Richardson,[146] directing HEW to take enforcement action against a large number of noncomplying southern school districts, that has injected the agency's civil rights recent operations with any life or sense of purpose.[147] At present there is no court order or other external stimulus to prod HEW into performing its statutory responsibilities in the North.

Nor is there any action on the horizon that promises to alter the current situation. Under HEW's much touted decentralization program, an Office of General Counsel attorney in each regional office will be assigned to work with civil rights investigators, and regional directors will

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146/ Supra, notes 49 and 125.

147/ The work required under Adams, along with the need for pre-grant and post-grant reviews under the Emergency School Aid Act of 1972 which made many northern districts eligible for desegregation aid for the first time, is frequently cited by HEW staff as a reason for non-action on northern school cases. But plaintiffs in the Adams case returned to court in May, 1974, to argue that HEW had failed to implement fully the court's directive. And there is no good reason to ignore Title VI enforcement, and allow federal funds to pour into school districts found ineligible for Emergency School Aid funds because of major civil rights violations, merely denying the districts new funds under ESAA. Fourteen such northern districts which were reviewed in 1973 were found ineligible for ESAA funds for the 1973-74 school year, yet continue to receive other federal aid. These districts include Chicago, Stamford, Conn., and Buffalo, which have had Title VI action pending against them since 1965, 1970 and 1971, respectively, as well as such big cities as Detroit, Los Angeles and Rochester, N.Y.

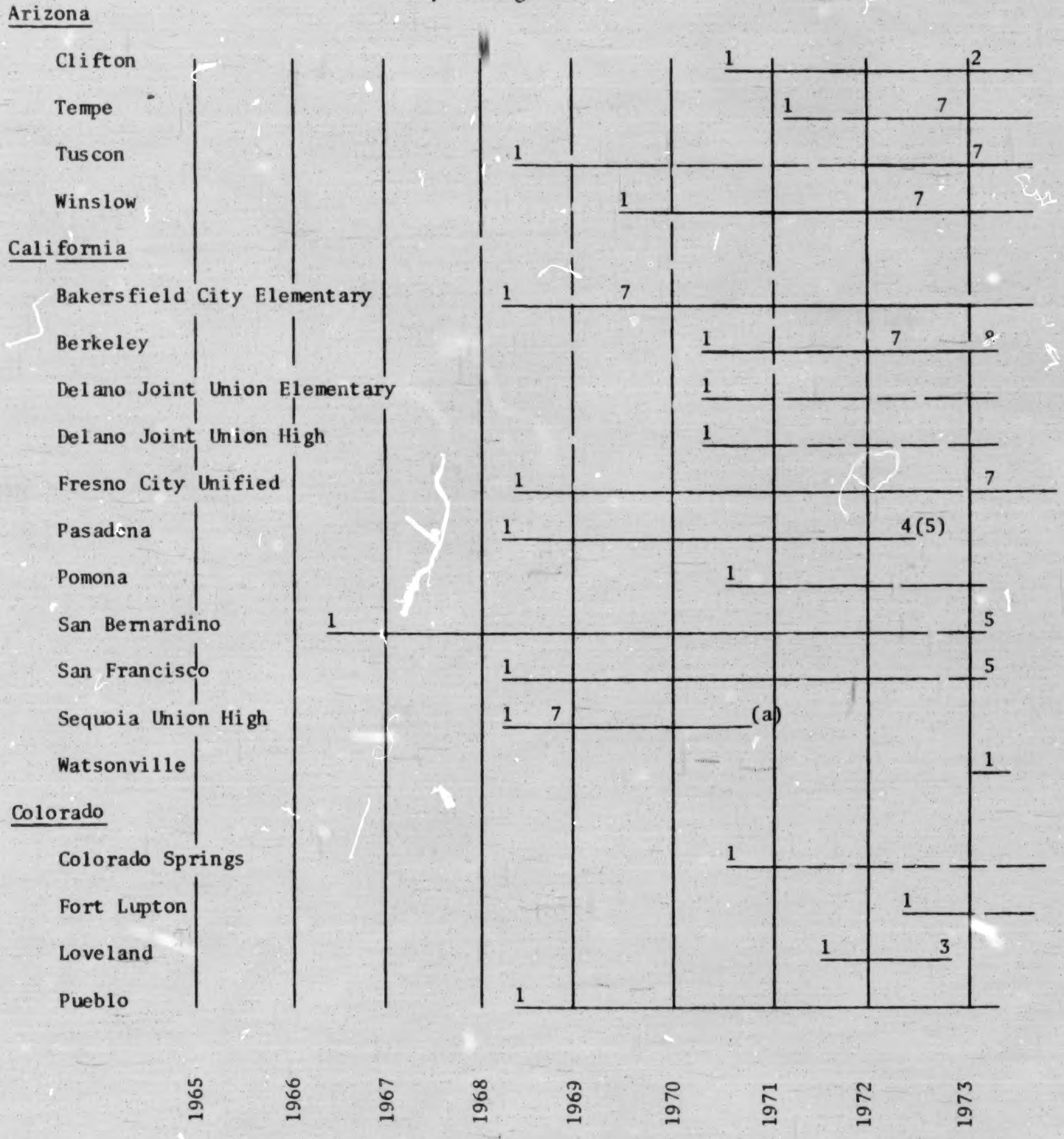
have authority to issue letters of probable non-compliance to school districts without seeking approval in Washington. To be sure, this can eliminate much of the delay which this report documents. But regional program officers often develop a vested interest in keeping funds flowing, and regional directors are often vulnerable to pressure from congressmen and local authorities who would be adversely affected by Title VI enforcement action. Unless Washington officials of HEW are prepared to insist that national civil rights standards are observed, decentralization may simply result in further dilution of responsibility.

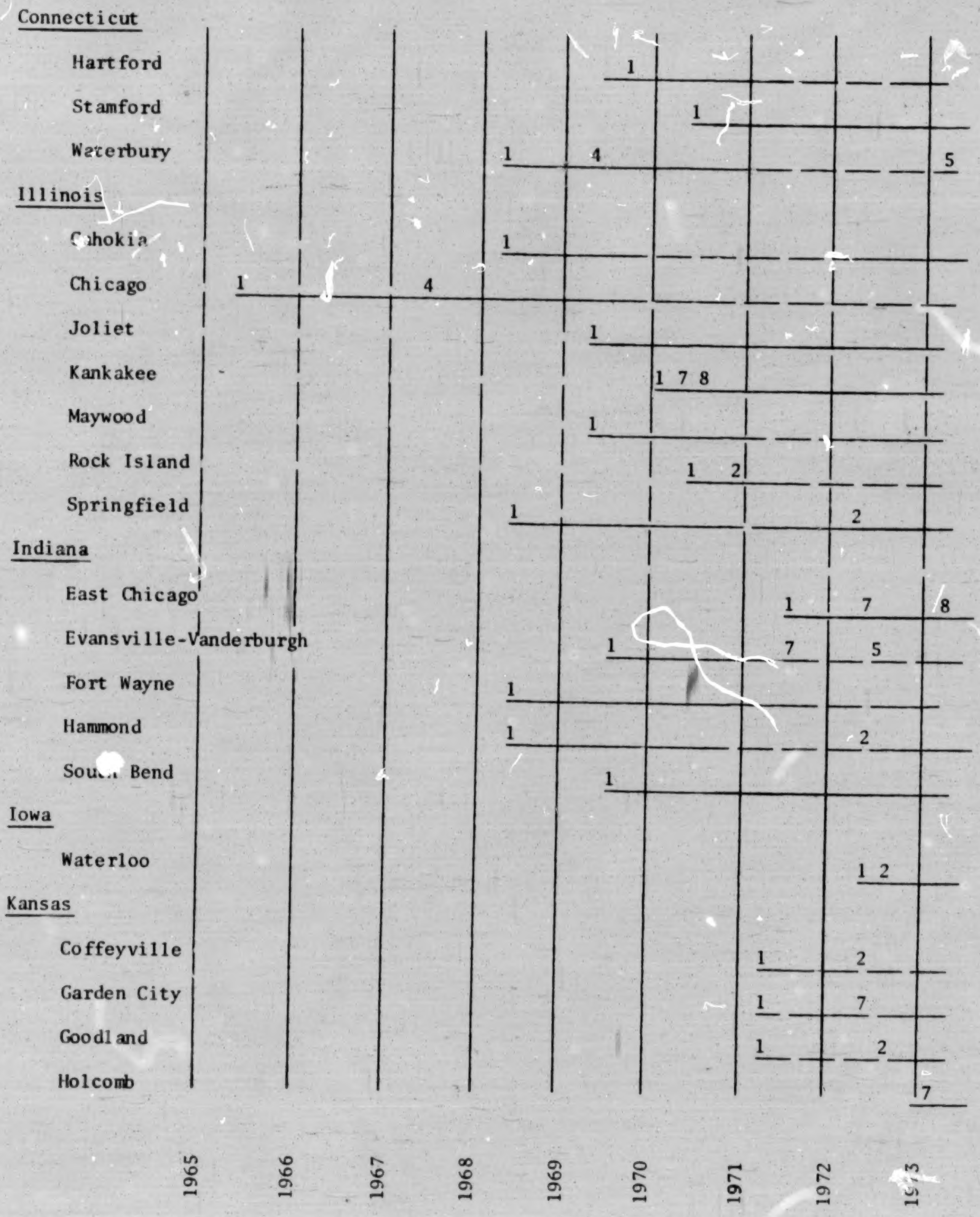
All of this means that minority citizens face continued disappointment of their legitimate expectations that the federal government will protect their children's rights. This situation could be altered -- by a Congress prepared to exercise its oversight responsibilities to assure that its laws are obeyed by the executive branch, by new political leadership committed to the rule of law and ready to appeal to people's aspirations rather than their fears, by federal officials determined to be faithful to their oaths of office, and by an aroused citizenry aware that the failure of government to protect the rights of any person threatens the rights of all. Absent initiatives of this kind, as succeeding anniversaries of the Brown decision come and go, our children will still be denied the equal protection of the law, and the bonds of law in this country will be further loosened.

APPENDIX A

The 84 Districts in the North and West Where HEW Has Conducted Title VI Reviews: Enforcement Action

Key on Page 112




Connecticut
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1
Stamford
1
Waterbury
1
4
5
Illinois
Cahokia
1
Chicago
1
4
Joliet
1
Kankakee
1 7 8
Maywood
1
Rock Island
1
2
Springfield
1
2
Indiana
East Chicago
1
7
8
Evansville-Vanderburgh
1
7
5
Fort Wayne
1
Hammond
1
2
South Bend
1
Iowa
Waterloo
1 2
Kansas
Coffeyville
1
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Garden City
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1965
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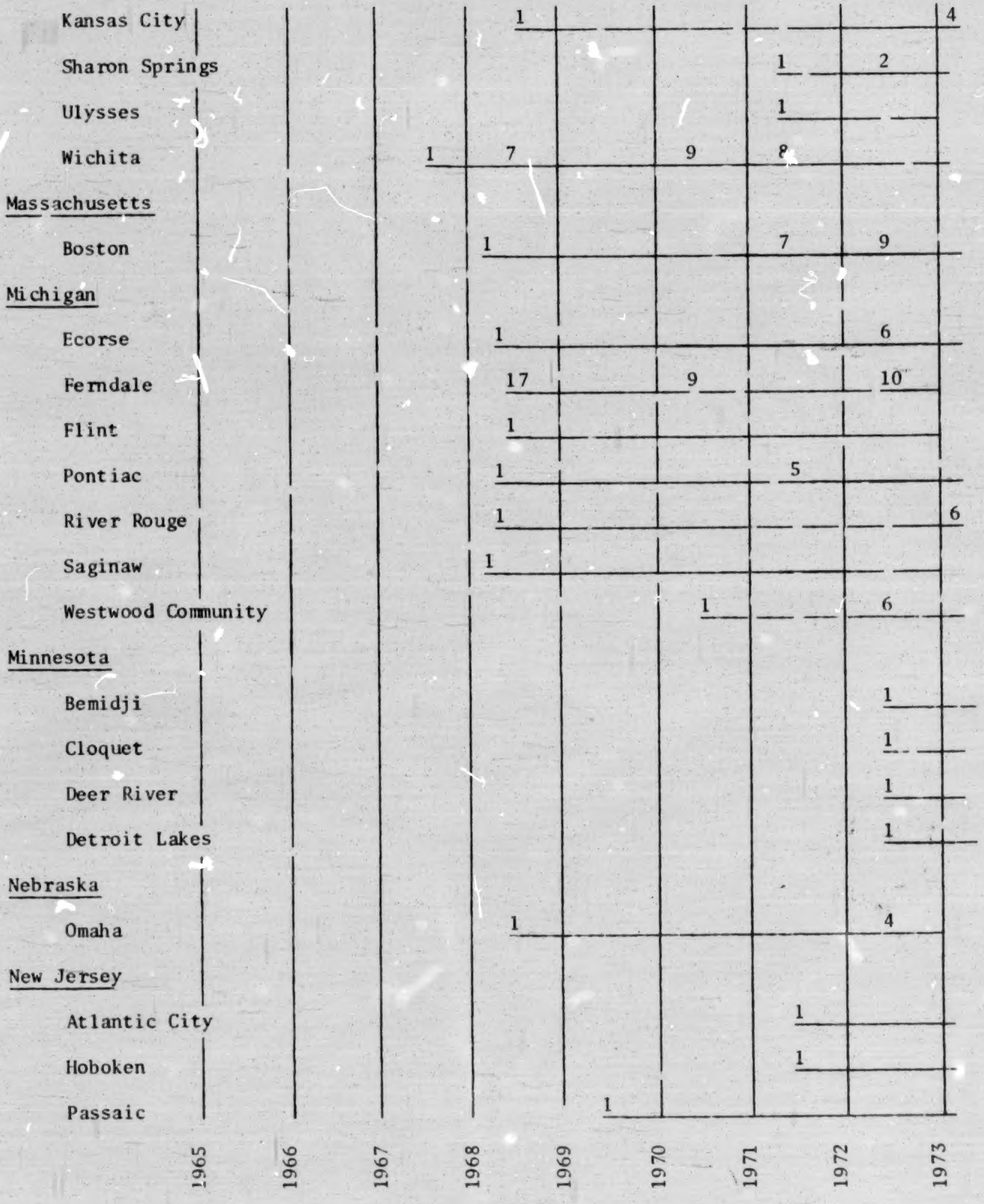
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Sharon Springs
1
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Ulysses
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Wichita
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Massachusetts
Boston
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Michigan
Ecorse
1
6
Ferndale
17
9
10
Flint
1
Pontiac
1
5
River Rouge
1
6
Saginaw
1
Westwood Community
1
6
Minnesota
Bemidji
1
Cloquet
1
Deer River
1
Detroit Lakes
1
Nebraska
Omaha
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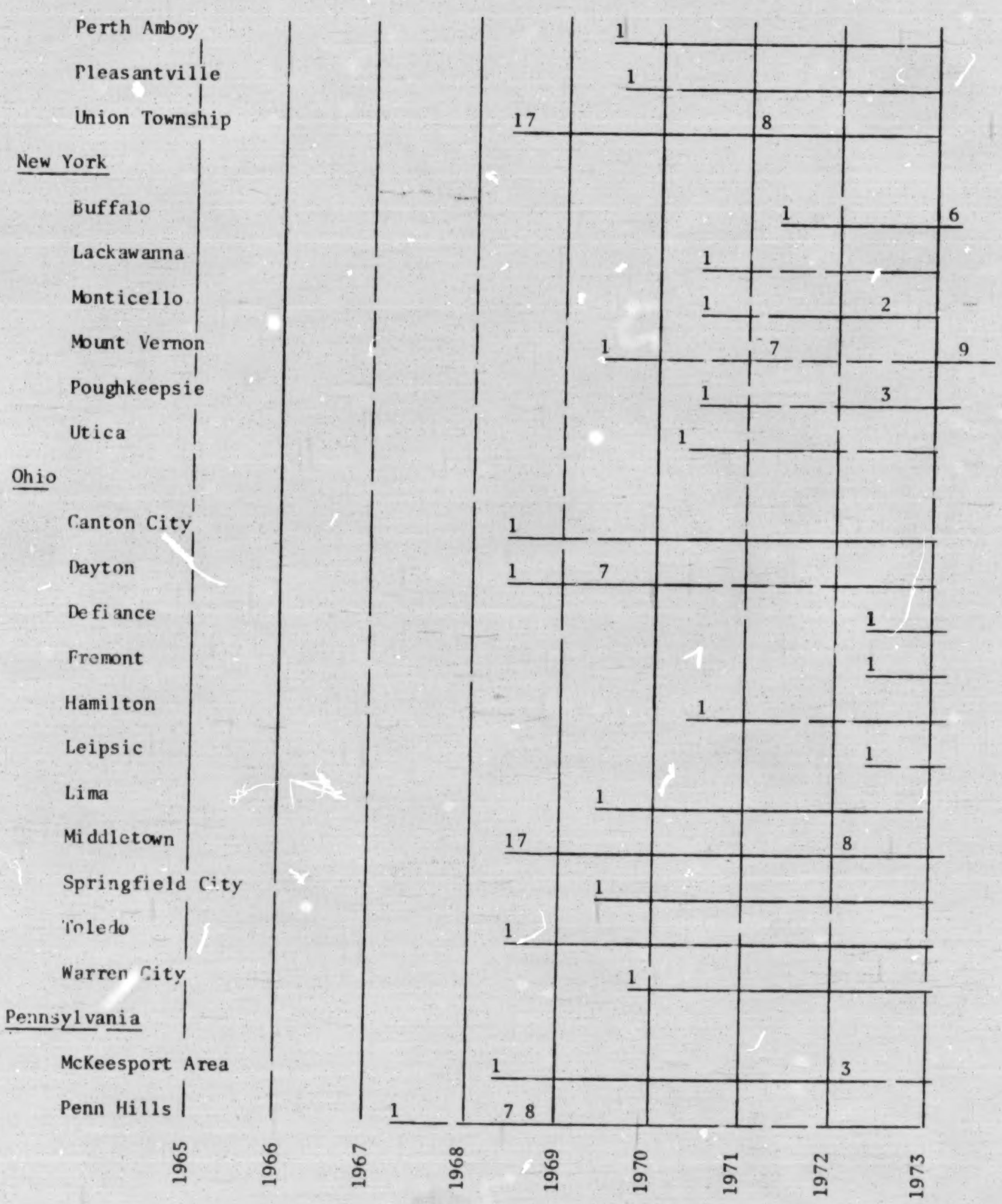
Perth Amboy 1
Pleasantville 1
Union Township 17 8
New York
Buffalo 1 6
Lackawanna 1
Monticello 1 2
Mount Vernon 1 7 9
Poughkeepsie 1 3
Utica 1
Ohio
Canton City 1
Dayton 1 7
Defiance 1
Fremont 1
Hamilton 1
Leipsic 1
Lima 1
Middletown 17 8
Springfield City 1
Toledo 1
Warren City 1
Pennsylvania
McKeesport Area 1 3
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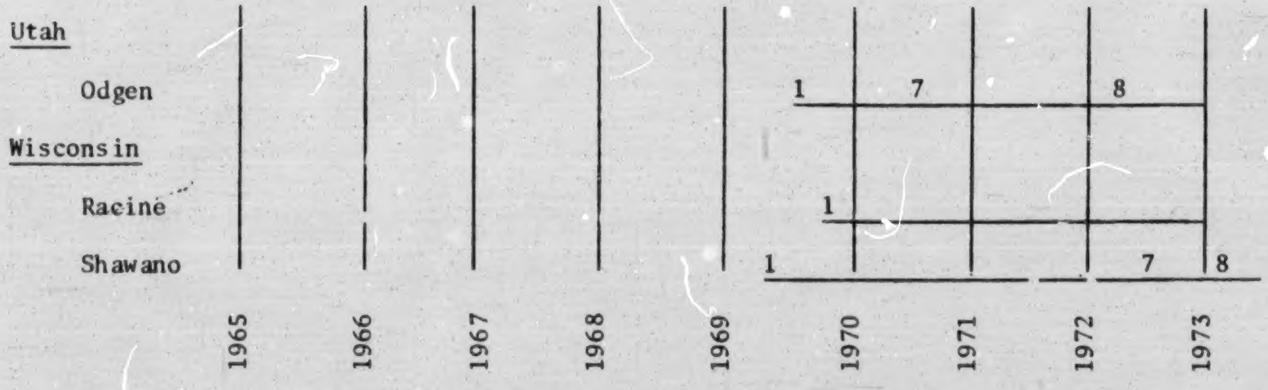

KEY

(1) Review initiated or first on-site visit

(2) Closed, insufficient evidence of non-compliance

(3) Closed, voluntary plan negotiated before a letter of non-compliance sent

(4) Closed, enforcement responsibility assumed by Justice Department

(5) Closed, settled by court order

(6) Review stayed pending court action

(7) Letter of probable non-compliance sent

(8) Closed, plan negotiated after letter of probable non-compliance sent

(9) Administrative hearing

(10) Federal funds terminated

(a) Plan rescinded.

APPENDIX B

The 84 Districts in the North and West Where HEW Has Conducted Title VI Reviews: Black, Spanish Surname and Total Enrollment, 1970

		Total Pupils	Black Pupils		Spanish Surname		Other[c]	
			No.	%	No.	%	No.	%
Arizona	Clifton[a]	827	4	0.5	620	75.0		
	Tempe	11,167	126	1.1	2,009	18.0		
	Tucson Elem.	39,618	2,289	5.8	10,889	27.5		
	Tucson High	17,728	799	4.5	4,013	22.6		
	Winslow [a]	2,776	184	6.6	635	22.9	A.I. 620	22.3
Calif.	Bakersfield City Elem.	23,258	3,531	15.2	5,606	24.1		
	Berkeley	15,908	7,115	44.7	561	3.5		
	Delano Jt. Union Elem.	3,253	164	5.0	1,769	54.4		
	Delano Jt. Union High	1,873	105	5.6	901	48.1		
	Fresno City Unified	57,508	5,133	8.9	11,274	19.6		
	Pasadena	29,114	9,563	32.8	2,664	9.2		
	Pomona	22,801	4,362	19.1	3,920	17.2		
	San Bernardino	37,691	5,786	15.4	7,318	19.4		
	San Francisco	91,150	25,988	28.5	12,389	13.6	O 18,921	20.8
	Sequoia Union High	12,323	1,623	13.2	622	5.0		
	Watsonville(Pajaro Vly.)	12,667	55	0.4	3,829	30.2		
Colorado	Colorado Springs	33,025	2,049	6.2	3,073	9.3		
	Fort Lupton	1,750	6	0.3	724	41.4		
	Loveland(Thmpsn.Sch.Dis.)	6,695	7	0.1	477	7.1		

		Total Pupils	Black Pupils		Spanish Surname		Other	
			No.	%	No.	%	No.	%
	Pueblo	26,045	591	2.3	9,911	38.1		
Conn.	Hartford	28,754	13,929	48.4	5,203	18.1		
	Stamford	20,886	4,257	20.4	848	4.1		
	Waterbury	17,826	3,454	19.4	1,288	7.2		
Ill.	Cahokia	8,556	1,424	16.6	14	0.2		
	Chicago	577,679	316,711	54.8	56,374	9.8		
	Joliet	12,117	2,976	24.6	640	5.3		
	Joliet Township Hi.Sch.	6,213	1,031	16.6	235	3.8		
	Kankakee	7,825	1,674	21.4	53	0.7		
	Maywood	6,454	3,027	46.9	248	3.8		
	Rock Island	11,690	1,623	13.9	195	1.7		
	Springfield	23,222	2,636	11.4	43	0.2		
Indiana	E. Chicago	9,986	3,903	39.1	3,640	36.5		
	Evansville-Vanderburgh	33,779	2,924	8.7	28	0.1		
	Fort Wayne	43,400	6,492	15.0	434	1.0		
	Hammond	23,582	1,713	7.3	1,104	4.7		
	South Bend	35,983	6,117	17.0	180	0.5		
Iowa	Waterloo	19,498	2,493	12.8	25	0.1		
Kansas	Coffeyville	4,019	515	12.8	47	1.2		
	Garden City	4,748	39	0.8	500	10.5		
	Goodland[b]	1,905						
	Holcomb[a]	428	0	0.0	86	20.1		

		Total Pupils	Black Pupils		Spanish Surname		Other	
			No.	%	No.	%	No.	%
	Kansas City	34,387	10,670	31.0	1,157	3.4		
	Sharon Springs[b]	458						
	Ulysses	1,771	5	0.3	190	10.7		
	Wichita	63,811	9,362	14.7	1,125	1.8		
Mass.	Boston	96,696	28,822	29.8	4,106	4.2		
Mich.	Ecorse	4,198	2,135	50.9	237	5.6		
	Ferndale	8,138	769	9.4	34	0.4		
	Flint	45,659	18,475	40.5	625	1.4		
	Pontiac	24,055	7,970	33.1	1,062	4.4		
	River Rouge	3,675	1,588	43.2	27	0.7		
	Saginaw	22,655	1,822	34.0	763	8.0		
	Westwood Community	4,961	1,980	39.9	25	0.5		
							A.I.	
Minn.	Bemidji	4,013	0	00.0	1	0.0	154	3.8
	Cloquet	3,673	0	00.0	0	0.0	143	3.9
	Deer River	1,274	0	00.0	0	0.0	276	21.7
	Detroit Lakes	3,758	0	00.0	0	0.0	185	4.9
Neb.	Omaha	63,516	11,786	18.6	890	1.4		
N.J.	Atlantic City	8,592	5,655	65.8	289	3.4		
	Hoboken	7,898	502	6.4	3,998	50.6		
	Passaic	8,524	2,724	32.0	2,219	26.0		
	Perth Amboy	6,598	799	12.1	2,688	40.7		
	Pleasantville	3,553	1,729	48.7	84	2.4		

		Total Pupils	Black Pupils		Spanish Surname		Other	
			No.	%	No.	%	No.	%
	Union Twp.	8,783	1,057	12.0	13	0.1		
N.Y.	Buffalo	70,305	27,069	38.5	1,620	2.3		
	Lackawanna	5,736	901	15.7	192	3.3		
	Monticello	3,485	559	16.0	95	2.7		
	Mount Vernon	11,938	6,725	56.3	259	2.2		
	Poughkeepsie	5,659	1,910	33.8	7	0.1		
	Utica	14,475	1,839	12.7	203	1.4		
Ohio	Canton City	20,867	4,278	20.5	71	0.3		
	Dayton	56,609	23,013	40.7	70	0.1		
	Defiance	3,975	4	0.1	485	12.2		
	Fremont	6,813	351	5.2	543	8.0		
	Hamilton	4,039	248	6.1	55	1.4		
	Leipsic	1,063	0	0.0	265	24.9		
	Lima	10,583	2,700	25.5	52	0.5		
	Middletown	13,856	1,696	12.2	13	0.1		
	Springfield City	2,790	65	2.3	38	1.4		
	Toledo	61,699	16,407	26.6	1,635	2.6		
	Warren City	14,282	3,318	23.2	9	0.1		
Pa.	McKeesport	10,463	1,346	12.9	61	0.6		
	Penn Hills	14,463	826	5.7	11	0.1		

		Total Pupils	Black Pupils		Spanish Surname		Other	
			No.	%	No.	%	No.	%
Utah	Ogden	16,274	511	3.1	1,768	10.9		
Wisc.	Racine	32,020	3,916	12.2	1,567	4.9	A. I.	
	Shawano	3,759	2	0.1	0	0.0	1,058	28.1
Total:		2,161,526	651,953	30.3%	182,941	8.5%		
Average:	25,542							
Median:	10,500							

Source: HEW/OCR, Directory of Public Elementary and Secondary Schools in Selected Districts: Enrollment and Staff by Racial/Ethnic group. Fall, 1970 (1972).

a/ id. 1970 edition, based on 1968 survey.

b/ National Center for Educational Statistics, Education Directory, 1970-72 Public School Systems. District was not one of those under 3,000 enrollment districts surveyed in either the 1968 or 1970 sample.

c/ Other ethnic groups only where significant to Title VI problem. "A.I." = American Indian; "O" = Oriental.